

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF LOUISIANA,
IN THE
WESTERN DISTRICT, AT ALEXANDRIA,
OCTOBER, 1843.

PRESENT:

HON. FRANÇOIS XAVIER MARTIN.
HON. HENRY A. BULLARD.
HON. ALONZO MORPHY.
HON. EDWARD SIMON.
HON. RICE GARLAND.

THOMAS JEFFERSON WELLS and another v. WILLIAM P. HICK-
MAN.

Where a party to whom interrogatories have been propounded, states facts not closely connected with those as to which he has been questioned, the opposite party should move to strike out such irrelevant matter.

Persons in possession as tenants cannot, by consenting to possess for a third person, or by permitting others to disturb their possession, or to cultivate the land, affect in any manner the rights of their landlords. C. C. 3408, 3409.

APPEAL from the District Court of Natchitoches, *King, J.*
Dunbar, for the plaintiffs.
Brent, for the appellant.

SIMON J. This case was before this court in 1838, and was then remanded for a new trial. See 12 La. 416. On its being
VOL. VI.

returned to the court below, the parties agreed to have it transferred to the parish of Rapides, where it was tried, *de novo*, and after a full investigation of the facts of possession relied on by the parties respectively, the Judge, *a quo*, was of opinion, that the plaintiffs were entitled to recover possession of the tract of land described in their petition, and gave judgment accordingly. From this judgment, the defendant has appealed.

On the trial before us, it has been urged, that one of the plaintiffs, in answering the interrogatories propounded by the defendant, attempted to extend his answers to proving a long possession of the premises; that this was illegal, as said answers were not called for by the interrogatories; and that those answers should be disregarded.

It is true, that according to the 353d article of the Code of Practice, the party interrogated may state some other facts tending to his defence, provided they be closely linked to the fact on which he has been questioned; but in this case, the question made was merely as to the date of the deed under which the plaintiffs claim, and as to the place where said deed was executed; and we are not ready to say, that they have a right to extend their answers to proving the possession which is the very foundation of their action. This fact was not called for by the interrogatories; and had the defendant moved the lower court to have it stricken out of the plaintiffs' answers, we think it should have been done. But the record does not show, that the defendant's exceptions to the uncalled for answers, were ever acted upon by the court below; no motion was made to strike them out; and we are unable to discover what weight was given to them by the inferior Judge, in rendering his judgment in favor of the plaintiffs. The presumption perhaps is, that they were disregarded, as nothing shows, that on the trial below, they were made the subject of any controversy.

On the merits of the case, we have attentively perused the parol evidence adduced in support of the pretended possession of the respective parties, and we cannot hesitate to say, that, without its being necessary to give any weight to the answers of the plaintiffs to the defendant's interrogatories, the plaintiffs have fully made out their case. It is shown, that the plaintiffs' possession began in 1827, at which time, two brothers named Lemoine were

put in possession of the land in dispute, in the name of one of the plaintiffs; that these persons continued to possess until 1833; that they were ordered off by the defendant, and were by him told to occupy the land in his name, or "*to leave it alone.*" The Lemoines cultivated it for about seven years, and left it in 1833, in the fall of which year the defendant sent persons to take possession of the land for him. The defendant made a crop on the land in 1834, and sent his negroes upon it in that year to cultivate it. The present suit was instituted in May, 1834, and it is clear, that the defendant had not been one year in possession of the premises, when the plaintiff brought his action of possession. The facts of possession upon which the judgment appealed from is based, are established, not only by the two Lemoines, but also by several other witnesses. One of them says, that when the Lemoines took possession of the land, it was as tenants of Bayley. Another states, that they cultivated it in 1833; that the defendant made a crop on the land in 1834; and, although something is said in the evidence, tending to show that Hickman made a crop on the land in 1832, still, it is positively established that the Lemoines did not cease to cultivate it until the fall of 1833, when Hickman sent his hands upon it to make the next crop.

Now, under arts. 3408 and 3409 of the Civil Code, if a person, who commenced his possession of an estate for another, should intend not to hold it any longer for that other, but for himself, yet shall he still be presumed to hold possession for the person for whom he originally took it. Here, the origin of the Lemoines' possession is clearly established. They were the tenants of Bayley. They possessed for him, and they could not, by consenting to possess for another, or by permitting other persons to disturb their possession, or to cultivate the land, affect in any manner the rights of their landlord. Such an act on the part of the Lemoines, would be *in fraudem legis*, and the new possessor should be considered as without any right or claim to the possession. 6 La. 58.

The case being before us as a mere possessory action, we have abstained considering the evidence introduced in relation to the titles of the parties to the premises in dispute. We are of opinion, that the plaintiffs have brought themselves within the pro-

Gaines and another v. Morris, Tutrix, and another.

visions of art. 49 of the Code of Practice, and that the Judge, *a quo*, did not err in maintaining them in their possession.

Judgment affirmed.

RICHARD M. GAINES and another v. SARAH MORRIS, Tutrix, and another, Co-Tutor of the minor heirs of Elias Bass, deceased.

A single citation is sufficient where the defendants, sued as tutrix and co-tutor of certain minors, are husband and wife C. P. 182. And when not separated from bed and board, its service on either will be good. Ib. 192.

A note endorsed in blank may be considered as one payable to bearer, and all the endorsements posterior to that of the payee, may be stricken out on the trial. But in an action against the maker of a note, or the drawer or acceptor of a bill, all the endorsements stated in the petition, though unnecessarily, must be proved.

APPEAL from the Court of Probates of Concordia, Dunlap, J.

MORPHY, J. The defendants and appellants are sued as tutrix, and co-tutor, of the minor children of Elias Bass, on two notes drawn by the latter, to the order of, and endorsed by, W. N. Thorn, and bearing other blank endorsements, stated in the petition. They neglected to answer, whereupon judgment was entered up by default, and confirmed in due course of law.

The appellants, who are husband and wife, have urged the insufficiency of the citation, which the record shows to have been served on Sarah Morris, the tutrix, *in person*. This, we think, was a legal service on both. Article 182 of the Code of Practice requires only one citation for both, and its service on either is good. Art. 192.

The judgment by default was made final, on proof of the signatures of the maker and payee, but none of the subsequent endorsements were proved, although specially averred. It is true, that a note endorsed in blank, may be considered as one payable to bearer, and all the endorsements posterior to that of the payee, may be stricken out on the trial; but as they were stated in the plaintiff's petition, and were suffered to remain on the note, the

The Union Bank of Louisiana v. Lamothe and others.

signatures of the endorsers ought to have been proved. We find the rule laid down in *Bailey on Bills*, p. 489, (edition of 1836,) that in an action against the drawer or acceptor of a bill, or the maker of a note, all the endorsements stated, though some may have been stated unnecessarily, must be proved. The plaintiffs, who sue as the last endorsees, not having proved all the signatures, by which they allege that these notes were transferred to them, judgment was erroneously given in their favor.

It is, therefore, ordered that the judgment appealed from be reversed, and that the case be remanded, for further proceedings according to law; the plaintiffs and appellees paying the costs of this appeal.

Shaw and Laurence, for the plaintiffs.

Stacy and Sparrow, for the appellants.

THE UNION BANK OF LOUISIANA v. SAMUEL V. LAMOTHE
and others.

The deposition of a witness must be reduced to writing by himself, by a magistrate, or by an indifferent person. It is inadmissible, if drawn up in the hand-writing of the party, or of his counsel.

APPEAL from the District Court of Rapides, *King, J.*

H. Taylor, for the plaintiffs.

Elgee, for the appellants.

MORPHY, J. This appeal is prosecuted by William C. C. C. Martin, and James M. Wells, from a judgment rendered against them as endorsers of a note drawn by Samuel V. Lamothe.

Our attention has been called to a bill of exceptions to the opinion of the District Court, in permitting the reading of the depositions of two witnesses examined under a commission, to prove notice to the endorsers. Of the various grounds taken in the bill of exceptions we will notice only one, which in our opinion is fatal. It is, that the depositions were in the handwriting of the counsel for the plaintiffs, who offered them in evidence. We

Boner v. Elgee.

have often held, that the deposition of a witness must be reduced to writing by himself, by the magistrate, or by an indifferent person, and that it is inadmissible, if drawn up in the handwriting of the party, or his counsel. 10 Mart. 441. 7 Ib. N. S. 321. 7 La. 585. With this decision which was made on grounds of public policy, we see no good reason to be dissatisfied. The testimony taken under the commission being excluded, the record shows no notice of protest to the endorsers.

It is, therefore, ordered and decreed, that the judgment of the District Court be avoided and reversed, and that ours be for the defendants as in case of nonsuit, with costs in both courts.

WILLIAM BONER v. JOHN K. ELGEE.

An action against a party in possession of slaves, in which the plaintiff prays for a judgment declaring the title under which the former holds to be fraudulent, and ordering the slaves to be sold for the purpose of paying a balance due to him as vendor, with damages for the expense to which he has been subjected, and recognizing his privilege as a vendor, must be brought before the court of the defendant's domicile, and not of the parish where the slaves may be. C. P. 89, 129, 162.

APPEAL from the District Court of Caddo, *Boyce, J.* This case turned on an exception to the jurisdiction of the District Court of Caddo, the defendant's domicile being in another parish. The lower court, having overruled the exception, proceeded to a trial on the merits. A judgment was rendered for the defendant, and the plaintiff has appealed.

Crane and M. C. Dunn, for the appellant. The exception was properly overruled. Code of Practice, art. 163. 4 La. 240. Civil Code, art. 461.

Tuomey, for the defendant. The exception was erroneously overruled. Every one has the right of being sued at his domicile, except in certain cases. Code of Practice, art. 89, 129, 162. This is the rule—the exceptions must be strictly construed. Art. 163, of the same Code provides, that when proceedings are instituted to obtain the seizure and sale of real property, by virtue

Boner v. Elgee.

of an act of hypothecation importing a confession of judgment, the defendant may be cited either within the jurisdiction of the court where the property is situated, or before that of the domicile of the defendant. Here, the action should have been before the court of the defendant's domicile. *First.* Because slaves are not real estate, within the meaning of art. 163, of the Code of Practice. Slaves though generally considered by the law as real estate, are not always so. By art. 3318, of the Civil Code, different modes are prescribed for the inscription of mortgages of *immoveables* and slaves. In the case of *Munday v. Wilson*, 4 La. 341, the court said, that though, for some purposes considered *immoveables*, slaves are in their nature *moveables*, and are not situated in any particular parish of the State. Having no *situs* of their own, they have one at the domicile of their owner. This view is strengthened by referring to art. 3318, of the Civil Code, which provides, that mortgages of *slaves* shall be inscribed at the domicile of their owner, while mortgages on *immoveables* are to be inscribed in the parishes where they are situated. *Secondly.* In this case the seizure and sale of the slaves is not prayed for, in virtue of any act of hypothecation importing a confession of judgment, within the meaning of the article cited. The act of sale, from which the plaintiff contends that the vendor's privilege results, does not import a confession of judgment; nor is there any hypothecation, or special mortgage of the slaves in controversy.

BULLARD, J. The plaintiff seeks to enforce the privilege of a vendor upon certain slaves, sold by him to one Malhé, and which are now the property of the defendant, who resides in the parish of Rapides. The petition, which is addressed to the District Court, in and for the parish of Caddo, where the slaves were at the time, sets forth the sale to Malhé by act before the Parish Judge of Natchitoches, then the acknowledged domicile of the purchaser; that Malhé afterwards confessed a judgment in favor of the defendant Elgee, and waived appraisal of the slaves, whereupon they were sold at a Sheriff's sale and purchased by Elgee. This judgment is alleged to be fraudulent and collusive. After various other allegations, which it is not necessary to repeat, the petition concludes with a prayer, that Elgee may be cited, and that the plaintiff may have judgment ordering

the sale of the slaves, to satisfy the balance of \$5825, still due him as vendor, together with \$100, for costs incurred in previous attempts to seize the slaves, and for further and general relief.

The defendant pleaded his domicil in the parish of Rapides, and excepted to the jurisdiction of the court.

Admitting that a mere order of seizure and sale might issue against slaves from the court of the parish where they are employed, rather than that of the domicil of the owner, which we do not decide, yet it is clear, that this case is something more. The District Court for the parish of Caddo, is asked to decide upon the question, whether the privilege of a vendor still exists in favor of the plaintiff, and whether the defendant had acquired a *bona fide* title to the slaves, and whether he was liable for any damages, or costs in consequence of the plaintiff having been baffled in the pursuit of his rights. These are questions to be settled by the court previously to the seizure of the slaves. It is one thing, to issue an order of seizure and sale, a mere summary execution, upon the presentation of authentic evidence of a mortgage, and another to decide between the parties upon the validity of such title, or the priority of another alleged to be better.

The court therefore erred, in our opinion, in not sustaining the exception, and in proceeding to a trial upon the merits. The questions presented by the petition, are such as the defendant had a right to have tried by the court of his domicil. Such a case, in our opinion, does not form an exception to the general rule.

It is, therefore, ordered, that the judgment of the District Court be reversed; that the plea to the jurisdiction be sustained, and the suit dismissed; the plaintiff paying the costs in both courts.

Caldwell and others, Heirs, v. Glenn, Curator.

MARTHA J. CALDWELL and others, Heirs of David B. Cooper,
v. SAMUEL GLENN, Curator of the vacant Succession of said
Cooper.

A citation which mentions neither the title of the cause, the residence of the defendant, nor the place where the office is held, in which the defendant is cited to appear and file his answer, is insufficient. C. P. 179.

Knowledge of the existence of an action on the part of a defendant, no matter how clearly brought home to him, cannot supply the want of citation.

In actions by the heirs, or others entitled to successions administered by curators or testamentary executors, for the possession of such successions, under arts. 1001, 1002 and 1003 of the Code of Practice, as in every other suit, there must be an issue joined before any final judgment can be rendered; and if the curator or executor does not answer, that issue must be made by a judgment by default. C. P. 310, 311, 312. Such actions must be in the ordinary form. The provision of art. 1002, that the judge shall pronounce on the claim in a summary manner, only means as shown by art. 1034, that he shall decide upon it with the greatest practicable celerity, giving it a preference over ordinary cases.

APPEAL from the Court of Probates of Catahoula, *Taliaferro*, J.

MORPHY, J. This is an appeal taken by the curator of the estate of the late David B. Cooper, from a judgment recognizing the petitioners as the heirs at law of the deceased, and decreeing to them the possession of his estate. The appellant has placed his case before this court upon the following assignment of errors apparent on the face of the record, to wit: "That there was no legal citation, and no judgment by default, nor answer in the case."

The record shows that a citation was served upon the defendant, but it is clearly defective and insufficient. It does not mention the title of the cause, the residence of the defendant, nor the place where the office is held in which he was cited to appear and file his answer. These requisites, and especially the last mentioned one, are expressly required by article 179 of the Code of Practice. It has been urged, that whatever may be the defects of the citation, the defendant cannot avail himself of them, because the record shows that he had full knowledge of the suit. In *Wall v. Wilson*, 2 La. 172, we said that knowledge of a suit on the

Caldwell and others, Heirs, v. Glenn, Curator.

part of the defendant, no matter how clearly brought home to him, will not supply the want of citation. It would have been, perhaps, sufficient to notice these defects in the citation, but as the judgment must be reversed, and the case remanded for further proceedings, it is proper to express our opinion on the necessity of a judgment by default being taken in a proceeding of this kind, as well as in an ordinary suit, before any final judgment can be legally obtained. The appellees' counsel has contended that under art. 1000, and the following, in the Code of Practice, the proceeding instituted by the petitioners was a summary one, and that no judgment by default was necessary. We think otherwise. Article 1000 requires of the heirs, or other persons entitled to successions which are administered by curators or executors, to present a petition to the Judge who appointed or confirmed them, praying that such curators or executors may be *cited* and compelled to account for their administration. Article 1001, requires the claimants of a succession to file, along with their petition, all their proofs, that the curator or testamentary executor may examine them; and the following article provides that the Judge shall pronounce on their claim, in a summary manner, as soon as the time allowed for the curators or executors to answer, shall have expired. These provisions indicate, that the heirs must proceed by a suit in the ordinary form, and they are required to file the documentary evidence they may have in support of their claim, that the defendants may make in their answer whatever objections to it, they may think proper to urge. The last article provides, it is true, that the Judge shall pronounce on the claim of the heirs in a summary manner; but this has nothing to do with the pleadings in the suit. It only means, as is shown by article 1034, that the Judge shall pronounce upon it with the greatest practicable celerity, and give it a preference over the ordinary cases; but it is clear, that in actions of this kind, as in every other suit, there must be an issue joined before any final judgment can be rendered. If the curator or executor does not answer, that issue must be made by means of a judgment by default. Code of Practice, arts. 310, 312; 6 Mart. N. S. 2, 11; 8 Ib. N. S. 339. After issue is thus joined, the Judge, if satisfied from an examination of the evidence that the claimants are entitled to the succession, shall put them in posses-

Dash and others v. Dosson, Curator.

sion of it, and shall direct the curator or executor to render an account within a reasonable time, to be fixed by him. Art. 1003. As the heirs in this case, proceeded correctly in the first instance, by filing their petition and all their proofs in the Court of Probates, as they were required to do by law, we think that the case should be remanded, in order that the Judge may issue a new citation to the curator.

It is, therefore, ordered, that the judgment of the Court of Probates of the Parish of Catahoula be reversed, and that this case be remanded for further proceedings; the appellees paying the costs in both courts.

Ryan and Purvis, for the plaintiff.

Mayo, for the appellant.

THOMAS J. DASH and others v. MICHAEL H. DOSSON, Curator
of the Succession of Hugh B. Johnson.

The testimony of a Probate Judge, in whose office a will should have been deposited, that he had seen the will in his office, but had searched for it in vain, cannot authorize the introduction of parol evidence of its contents, and of its having been proved and ordered to be executed, where the minutes of the Probate Court are not produced, nor alleged to have been mislaid, lost, or destroyed. Such evidence, though admitted without objection, would be insufficient to establish the will.

APPEAL from the District Court of Catahoula, *Willson, J.*

MARTIN, J. The plaintiffs are appellants from a judgment rejecting their claim to three slaves in the possession of the defendant, who avers that the slaves were the property of Hugh B. Johnson, who inherited them under the will of Mary Johnson, his wife, and that they are in his, the defendant's, possession, as curator of the estate of the said Hugh B. Johnson. The plaintiffs are the heirs of Harmon Dash, Jr., who was a brother and the heir of the said Mary Johnson, the owner of the slaves claimed. The defendant, to establish the title of Hugh B. Johnson, introduced proof of the will of Mary Johnson, and of the proceedings of the Court of Probates, before which he alleged that

it had been proved and ordered to be executed. Parol proof of this was admitted, although the destruction of the will and proceedings was not established. It is true, the Judge of Probates deposed that he had seen the will of Mary Johnson in his office; and that at the request of the defendant, he had in vain made search for it. This, indeed, might prove that the will was mislaid or lost, so that it could not be found. This might be equivalent to proof of its destruction, and authorize the admission of proof of its contents; but the minutes of the Court of Probates are all extant, and no part of them is alleged to have been mislaid, lost, or destroyed. If the will was proved, and its execution ordered, an entry of this should have been made on the records of the court, viz., on its minutes. It cannot be assumed, that a court of justice has its proceedings written on loose papers. The Parish Judge has testified that he has closely examined the minutes of his court, and has found no entry of the probate of Mrs. Johnson's will, or of any order for its execution; that he had made a vain search for any paper relating to the will; and that his predecessor kept his office in very bad order.

But a witness has sworn, that "the proceedings of old Dash's estate were found on detached pieces of paper in the Parish Judge's office, and not recorded in any book." We cannot well infer from this, although it may be probable, that the proceedings relating to the probate and order of execution, of Mrs. Johnson's will, were so kept. When a paper or record is lost or destroyed, evidence of its contents must come from a person who has read it. In the present case, there is "parol evidence," that the will was proved and ordered to be executed, but no one testified as to the minutes, or records of the court relating thereto, as having ever read such minutes or records.

The counsel of the defendant and appellee, has laid great stress on the parol evidence having been received without any objections being made, or bill of exceptions taken thereto. We are of opinion that, admitting the evidence to have been legally received, it is insufficient. The same may be said as to the alleged compromise.

It is, therefore, ordered that the judgment be annulled, and that the plaintiffs recover from the defendant, the slaves Patty, Win-

Notrebe v. M'Kinney.

ney, and Judy; and the record not enabling us to ascertain the value of the services of those slaves, to which the plaintiffs are entitled, it is ordered, that the case be remanded to ascertain the right of the plaintiffs thereto; the defendants paying the costs in both courts.

Mayo, for the appellants.

Garrett, for the defendant.*

FREDERICK NOTREBE, Surviving Partner, &c. v. ELIZABETH
McKINNEY.

The laws of this State recognize no authority in a surviving partner. He cannot administer the effects of the partnership, until regularly appointed; nor is he then styled the surviving partner, but administrator. Nor will the omission of a defendant to except to the capacity of one who sues as a surviving partner, be considered as an admission of his right to sue as such. That which has no legal existence cannot be considered as tacitly admitted.

Payment of part of a note as agent for the defendant, by one who had drawn it in that capacity, is not evidence of his authority to bind the defendant as drawer of the note. He may have been acting as a general agent, with powers of administration only; the power to draw or endorse a note, or bill, must be express and special. C. C. 2966.

APPEAL from the District Court of Concordia, Curry, J.

F. H. Farrar, for the appellant.

Dunlap, for the defendant.

BULLARD, J. The plaintiff sued as surviving partner to recover the balance of a note, purporting to have been given by the defendant, through her agent. The answer was the general denial, and the prescription of three and five years. There was judgment final for the defendant, and the plaintiff has appealed.

* *Garrett*, for a re-hearing, urged that it is not required, either by the Civil Code, or the Code of Practice, that any mention of the probate of a will, should be made in the minutes of the court. Citing the Civil Code, arts. 1637 to 1650, and the Code of Practice, arts. 928 to 943.

Re-hearing refused.

His counsel contends, that the capacity of the plaintiff, as surviving partner, not having been specially denied, was admitted, and that he was entitled to judgment. To that it is a sufficient answer to say, that no such legal capacity exists in our jurisprudence as that of surviving partner, although, in certain cases, the surviving partner be entitled to administer, on being regularly appointed. Until such appointment, he has no authority, nor is he then styled the surviving partner, but administrator. That which has no legal existence cannot be considered as tacitly admitted, by omitting to put in an exception, *in limine litis*. The general denial put at issue the plaintiff's right to recover.

It is further urged by him, that this principle at most would authorize a nonsuit, but that the judgment rendered is a final one. The defendant's counsel, however, contends, that he was entitled to judgment on the plea of prescription, more than five years having elapsed since the maturity of the note before the commencement of this suit; and, moreover, that there is no evidence that the person who signed the note as her agent, was such. This difficulty appears to us insurmountable. The code requires that the power to draw or endorse bills of exchange, or promissory notes, shall be express and special. Art. 2966.

The agency is expressly denied by the answer, and there is no evidence to prove it. The payment of a part by the same person in that capacity, does not show it, because he may have been acting as a general agent with powers of administration only, but have been incompetent to bind the defendant as drawer of a promissory note.

Judgment affirmed.

NATHANIEL HARRISON v. DAVID S. STACY, Administrator of
the Succession of CHARLES S. LEE.

By an act of the Legislature of the State of Mississippi, of the 26th of November, 1821, sect. 115, it is provided, that any claim against the estate of one deceased, not presented to the executor, administrator, or collector within eighteen months after the publication of notice for that purpose by such executor, &c., shall be forever barred, and the estate discharged therefrom. Plaintiff, a resident of that State, being the holder of a claim against the estate, the deceased barred by that act, commenced an action against the administrator of a part of the succession situated in this State. *Held*, that the claim being barred in Mississippi, must be considered so in this State.

APPEAL by the plaintiff, from a judgment of nonsuit, pronounced by the Court of Probates of Concordia, *McWhorter, J.*

F. H. Farrar, for the appellant. Prescription pertains to the remedy, and is governed by the *lex fori*. The statute of Mississippi, of 26th November, 1821, can have no extra-territorial effect. 7 Mart. N. S. 108.

Stacy and Dunlop, contra. The statute does not relate to the remedy, but extinguishes the obligation. *Pickett's Ex'rs v. Ford*, 4 Howard's Miss. Rep. 119, 250. Story, Conflict of Laws, 582. 5 Cranch, 358. *Beckford et al. v. Wade*, 17 Vesey, 88.

BULLARD, J. This is an action instituted on the last of October, 1842, against the administrator of the estate of Charles S. Lee, late of the State of Mississippi, deceased, to recover the amount of a promissory note, drawn by Wilson & Allison, and endorsed by Bowen and the said Charles S. Lee, payable on the 1st of January, 1838, at the Planter's Bank in Natchez, at which place the plaintiff, who alleges himself to be the holder, avers that payment was duly demanded, and the note protested. He avers that the administrator has refused to admit the note as a just claim against the estate.

The administrator set up two grounds of defence. He denies, in the first place, that there ever was such notice of protest given, as to bind the estate of Lee, and alleges that it is not liable in consequence of the endorsement. He next avers that the plaintiff's demand against the estate of Lee is forever barred and ex-

tinguished, according to the law of Mississippi, where said note was executed and endorsed by Lee, if at all. That the plaintiff is, and has been for the last six years, a resident of the State of Mississippi, and constantly present in said State. That in October, 1836, Charles S. Lee died in said State, in Claiborne county, where he had his residence. That in 1837, his widow Anne Lee was duly appointed administratrix of his estate. That she gave notice as required by law to all creditors, and persons holding claims, to exhibit them within the time limited by law, or that they would be barred; but that the plaintiff failed and neglected to present, or exhibit the claim herein sued on to said administratrix, within the eighteen months after the date of the aforesaid publication and notice, as required by law; by means of which neglect and failure, said claim became *ipso facto* extinguished, and the estate and succession of the said Lee forever discharged therefrom.

That the estate of Lee was a Mississippi estate, he having been a citizen of that State, and having died there; that administration thereupon was conferred by competent authority on his widow, who gave the notices required by the statute, and that the plaintiff then, according to his own showing the holder of the note sued on, was a citizen of that State, and resident near the place where the administration was granted, and the notices were published, are facts abundantly proved in the record.

The defendant administers upon that part of the property of the estate situated in Louisiana, and any claim admitted by him forms a charge against the estate in Mississippi, and would diminish *pro tanto*, the distributive share of the heirs. The statute which he relies on is in the following words: "All claims against the estates of deceased persons, shall be presented to the executor, administrator, or collector within eighteen months after the publication of notice for that purpose by such executor, &c., and not after; and all claims not presented within the time aforesaid shall be forever barred, and the estate of the testator or intestate, shall be thereafter discharged from the payment of such claim or claims; and the executor, administrator, or collector may give this act in evidence without pleading the same specially, in bar of any suit or action either in law or equity, brought to recover

Dayton v. The Commercial Bank of Natchez.

the amount of any claim or claims of which notice had not been given by the creditor or creditors, according to the foregoing provisions," &c. Act of 26th November, 1821, sect. 115.

It appears to us most manifest, that if this claim were now presented against the estate of Lee in any court of the State of Mississippi, it could not avoid pronouncing it extinguished, and forever barred. If by the lapse of eighteen months, without presentation to the representative of the estate, this claim no longer formed a charge upon it, but was forever barred, we do not see upon what principle it can be made to avail as a charge upon that part of the estate situated in Louisiana, when presented several years after it had ceased to be a valid claim against the same estate, according to the law of the State where the succession was opened, and all the parties resided. We think it our duty to pronounce in this matter, as we believe the courts of our sister State would decide, that the claim here presented, is forever prescribed and barred, by virtue of the law above quoted, of the Legislature of Mississippi. In thus giving effect to the law in question, we act upon a well settled principle of international jurisprudence. See Story, Conflict of Laws, 487, § 582. 17 Vesey, 88.

Judgment affirmed.

DORINDA DAYTON v. THE COMMERCIAL BANK OF NATCHEZ
and others.

Where defendant is in possession of a judgment for a certain sum, payable in specie, from which no appeal has been taken, an allegation by the party against whom it was rendered, that, by the original contract, he was entitled to discharge the debt in the notes of a particular bank, cannot be inquired into on an application to enjoin the execution. Such a defence should have been urged in the original suit in which the judgment was rendered, under which the execution was issued.

In an action by one for the use of another, the latter is the real plaintiff. In such an action the defendant may urge any defence he may have against the nominal, or the real plaintiff.

Dayton v. The Commercial Bank of Natchez.

Art. 624, of the Code of Practice, which declares, that one, in whose favor a judgment has been rendered which is subject to appeal, cannot take out execution until ten days shall have elapsed, counting from the notification to the opposite party, must be construed in connection with art. 575, of the same Code, and be understood as excluding Sundays from the ten days. It could not have been intended to allow an execution, so long as the defendant is entitled to a suspensive appeal.

An injunction against an execution, prematurely issued, will not be perpetuated where the creditor will be entitled to take out another execution as soon as the injunction against the first is perpetuated. All that the injured party can expect is, to be relieved from the payment of costs and damages, having had the benefit of all the delay to which he was entitled.

APPEAL from the District Court of Concordia, *Willson, J.*

MARTIN, J. A suit having been instituted by the Commercial Bank, expressly for the use of the Mechanics and Traders Bank, against the present plaintiff, judgment was obtained against her, and execution issued thereon, whereupon she obtained an injunction to stay the proceedings against her, on the ground, that she had tendered the amount of the judgment in the notes of the Commercial Bank, to whom she was originally indebted, on a debt contracted in the State of Mississippi, by which State the said Bank was chartered, and that, according to the laws of that State, her debt might be discharged by a tender of the notes of said Bank, whether it continued to be her creditor, or had transferred the debt; that the Mechanics and Traders Bank, to whom the Commercial Bank had transferred the debt, did not acquire by the transfer other rights than those of the transferrer, and, therefore, had not that of insisting on payment in specie, but was bound to receive the notes of the Commercial Bank. The injunction was perpetuated, and the Sheriff was ordered to receive in discharge of the execution the notes of the Commercial Bank, and to return it satisfied. The defendants have appealed.

Admitting all the allegations of the plaintiff to be true, it is now too late for her to avail herself of them. The defendants are in possession of an absolute judgment, condemning her to pay a sum of money in specie, which is unappealed from, and cannot be opened, and its regularity inquired into by the court which rendered it, on the plaintiff's application to enjoin the execution of it.

It is further contended, that the Mechanics and Traders Bank are not the owners and absolute transferees of the plaintiff's debt to the Commercial Bank, but hold it only as a collateral security, or pledge, and that the Commercial Bank is consequently still the creditor of the plaintiff, and that by a law of the State of Mississippi, the Banks of that State are prohibited from assigning or transferring the debts due to them. To this the defendants have correctly answered, that if any of these matters were available, they ought to have been urged, and insisted on in the suit in which the judgment, the execution of which is sought to be arrested, was rendered. It has further been contended, that the Commercial Bank, and not the Mechanics and Traders Bank, was the real plaintiff in the suit in which judgment was obtained against the present plaintiff, at least, that the latter was entitled to urge therein any matter of defence to which she was entitled against either of the Banks, and we have been referred to 1 Robinson, 394, and 19 La. 210. In 5 Mart. 525, 561, this court held, that if A. sue for the use of B., the latter is the real plaintiff, and with this decision we are not dissatisfied; neither is it expressly opposed to those in the cases cited from 1 Robinson, and 19 Louisiana Reports, in which we held, that in a suit by A., for the use of B., the defendant may urge any plea he may have against the nominal, or real plaintiff. So in the present case, the plaintiff might have urged any matter of defence which she had against the Commercial Bank before the notice of the transfer; and against the Mechanics and Traders Bank, any matter of defence which she might have had against it.

Lastly, the injunction has been claimed on the ground, that the execution was issued prematurely. Notice of the judgment was served on the present plaintiff and appellee, on the 3d of January, 1843. The execution bears date the 14th of the same month. If the date can be taken for the day on which the execution was issued, there were between the service of the notice and the day of issuing the execution, (from which, ten days being necessary, a Sunday must be excluded,) but nine days. If the date of the execution does not establish the day on which it was issued, this was done in the present case by the affidavit on which the injunction was granted, which attests, that the execution was issued on

the fourteenth. This note being denied in the answer, must conclude the defendant and appellant. The Code of Practice, art. 575, provides, "that no appeal shall stay execution, unless the same is claimed within ten days, (*Sundays excepted*,) after notice given of the judgment." The same Code, art. 624, provides, that: "Respecting judgments subject to appeal, the party in whose favor one is rendered, can only proceed to the execution after ten days, counting from the notification which he is obliged to make to the opposite party." We are of opinion, that these two articles must be construed together; and the exclusion of Sunday from ten days in the first, must be extended to the same number of days in the second, as the Legislature cannot be supposed to have intended to permit a party to harrass his adversary by an execution, as long as the latter had the right to protect himself from it by an appeal.

If an execution issues prematurely, the party injured cannot demand to have an injunction restraining it perpetuated, if his adversary has a right to obtain another execution as soon as the injunction against the former is perpetuated. All that he can expect is, to be relieved from the payment of costs and damages, as he has had the benefit of all the delay he was entitled to.

It is, therefore, ordered, that the judgment appealed from be reversed, and that the injunction be dissolved; the defendant and appellant paying the costs of the lower court, those of the appeal to be borne by the plaintiff and appellee.

Saunders and Frost, for the plaintiff.

F. H. Farrar, for the appellant.

Lawrence, Syndic, v. Bowman and another.

RICHARD J. LAWRENCE, Syndic of the creditors of Abner Smalley v. ELAM BOWMAN and another.

It is essential to a revocatory action in which an act of an insolvent is attacked, as having been made in fraud and to the injury of his creditors, that fraud should be alleged against the debtor, who must be a party to the suit.

A sale under execution must be made either on the premises, or at the seat of justice of the parish, unless with the consent of the debtor, or it will be annulled. C. P., 664, 665.

APPEAL from the District Court of Concordia, *Curry, J.*

SIMON, J. The object of this suit is to annul a sale made by the Sheriff of the parish of Concordia, of property seized in the possession of one Abner Smalley, by virtue of sundry executions issued against him. The property was adjudicated, at one year's credit, to the defendant, Bowman, for the sum of \$4400; \$4000 of which, as it is recited in the Sheriff's return, embraced the purchaser's liability for the payment of a mortgage, leaving a balance of \$400 to be applied to the executions, for which the purchaser gave his bond.

The plaintiff sues in his capacity of syndic of the insolvent estate of Abner Smalley, and for the benefit of the insolvent's creditors. He alleges, that the sale made by the Sheriff, was made clandestinely and fraudulently between the Sheriff and the defendant, Bowman, and in fraud of the debtor's creditors, for a sum far below the value of the property; that the formalities of the law were not complied with; that the returns of the Sheriff, on the back of the writs, are false and fictitious; and that the sale, adjudication, and deed of sale, are null and void, &c.

The defendant, Bowman, pleads the general issue; alleges the legality of the sale made to him; avers that he has paid the amount of his purchase; and sets up, that the plaintiff's petition discloses no legal right, and no legal cause of action against him, by which the plaintiff can inquire into, or in any manner question the title acquired by him, the defendant, from the said forced sale. He also pleads the prescription of one year.

There was judgment below in favor of the plaintiff, annulling the sale made by the Sheriff, and declaring the title of the proper-

Lawrence, Syndic, v. Bowman and another.

ty to be and remain in the creditors of Abner Smalley, and from this judgment, the defendant, Bowman has appealed.

Notwithstanding the allegations contained in the petition, charging fraud against the defendant, Bowman, in connection with the alleged fact of Smalley's having made a cession of his property to his creditors within three months after the sale, and of his having occupied, and still continuing to occupy the property as owner, since the said sale, we cannot view the present action in the light of a revocatory one. No fraud is alleged against Smalley; he was not made a party to this suit; and it is an essential requisite in a revocatory action, that fraud should be alleged and established against the debtor, whose act is attacked as having been made in fraud, and to the injury of his creditors.

We shall, therefore, consider the present action as one in revendication, based upon alleged irregularities and informalities in the sale complained of, and instituted for the purpose of bringing back to the mass of the insolvent estate, property which was illegally alienated before the cession, and which never ceased to belong to the debtor, or to the estate by him surrendered.

With this view of the present action, it is unnecessary to inquire into the questions resulting from the fraud alleged, and from the facts which may have been established in support of it as a revocatory action; but the collusion that may have existed between the deputy Sheriff, who made the sale, and the defendant, Bowman, would be perhaps a sufficient ground to annul a sale of this kind, in an action of revendication, if legally established, as this fact would be independent of the action of the debtor, and would give to the latter a right of action to obtain the cancelling of the sale. So it would be with regard to the want of the legal requisites in making the sale, and to all the other illegal circumstances which surrounded it. The debtor himself, and after his *cessio bonorum*, the syndic appointed by his creditors, has a right to institute an action to revendicate the property, and take it out of the hands of the person to whom it was illegally adjudicated.

Several grounds of informality have been pointed out to us, and insisted on by the plaintiff's counsel, one of which appears to us fatal. It is that which relates to the place where the sale was made. It appears from the advertisement published by the officer,

Lawrence, Syndic v. Bowman and another.

and from the testimony of the witnesses, that the sale was made neither on the premises, nor at the seat of justice of the parish, but at the dwelling house of one Miller, who lives eight miles from the premises. This was clearly illegal, as nothing shows that it was done with the consent of the debtor. Code of Practice, arts. 664 and 665. This ground is well taken, and is also sustained by our decision in the case of *Zacharie v. Winter*, 17 La. 82, in which a similar point was raised. This alone, is sufficient to annul the sale complained of.

The expression of our opinion on this point, renders it unnecessary to examine the other alleged grounds of nullity; but we cannot forbear remarking, that a careful inspection of the record has induced us to believe, that there are other informalities which, in themselves would, perhaps, have been sufficient to annul the sale under consideration, and that the return of the Sheriff, made under the report of the deputy who executed the writ, was made under suspicious circumstances. The evidence shows, that the sale was made at a very low price, not at all adequate to the real value of the property; but however this may be, all that the defendant can pretend to claim is the reimbursement of the amount by him paid on his bond, which right, we think, ought to be reserved to him, if he can show that he has paid it to the seizing creditors.

It is, therefore, ordered, that the judgment, of the District Court be affirmed with costs; reserving to the defendant, Bowman, the right of claiming of the insolvent estate of A. Smalley, represented by the plaintiff, the reimbursement of the amount which he, said Bowman, may have paid on his twelve months' bond to the seizing creditors of the insolvent.

Stacy, Sparrow, and Shaw, for the plaintiff.

Frost and Elam, for the appellant.

Succession of Aaron Lilley—Scott, Executor, Appellant.

SUCCESSION OF AARON LILLEY—Thomas B. Scott, Testamentary
Executor, Appellant.

A creditor of a succession, holding a claim which had been acknowledged, in writing, by the executor to be just, and had been placed among the admitted claims against the estate, subsequently petitioned the Probate Court to have the same ranked as a privileged debt, but did not make the executor a party to the proceeding. A judgment having been rendered *ex parte*, establishing the privilege, on appeal by the executor: *Held*, that the executor, not being a party, the judgment must be reversed.

Though an executor have acknowledged in writing a claim against the estate to be correct, if before paying it he discovers that it had been discharged by the deceased, it is his duty to protect the succession against a second payment.

APPEAL from the Court of Probates of Madison, *Downes, J.*

BULLARD, J. It appears that Phillips, was the owner, by assignment, of a claim against the estate of Lilley, which had been acknowledged by an endorsement in writing, signed by Scott, the executor, to be a just claim, and which was put down among the admitted claims against the estate. This was in July, 1841.

On the 3d of October, 1842, Phillips presented his petition to the Judge of Probates, praying that his claim might be ranked as a privileged one. The executor was not made a party to the proceedings. The Judge, however, proceeded, *ex parte*, to render a formal judgment, decreeing that the claim be established and ranked as a privileged debt of the succession, and paid by the executors next after the builders' claim. Formal notice of this judgment was given to the executor, who does not appear to have paid any attention to it.

On the 1st of November, 1842, the claimant again petitioned the Judge of Probates, setting forth the above facts, and that notice of judgment had been served on the executor. That he had neglected to pay, and had failed to inform the officer who served the notice, that he had no funds in his hands belonging to the estate of Lilley, or in any manner to comply with the law. He, therefore, prayed that the executor might be ordered to show

Succession of Aaron Lilley—Scott, Executor, Appellant.

cause why execution should not be issued against him personally, to make the amount of his debt, with interest and costs.

The executor showed for cause, that he had never been cited to answer the plaintiff's original petition, nor served with a copy of the same, and that he had never been served with notice of judgment. On the merits, he denied all the allegations in the petition, and averred, that the sum of money claimed had been in fact paid by his testator, Lilley, in his lifetime.

Notwithstanding these grounds, the rule was made absolute, and execution was ordered to be issued against the executor personally; and he has appealed.

The court, in our opinion, erred. The first ground assumed by the executor was clearly sufficient; to wit, that he was not a party to the judgment rendered in favor of the plaintiff. But it further appears, that on the trial of the rule, the executor offered to prove, that the debt claimed by Phillips had been paid by the testator, and a bill of exceptions was taken to the refusal of the Judge to admit the evidence. Although he had acknowledged in writing the justice of the claim, yet if he had discovered in the meantime that he was mistaken and that in point of fact the debt had been paid by the deceased, it was his duty as executor, to protect the estate against a second payment.

It is, therefore, ordered, that the judgment of the Court of Probates be avoided and reversed, and that the rule taken on the executor be discharged, with costs in both courts, to be borne by the plaintiff and appellee.

Phillips, pro se.

Snyder, for the appellant.

JOHN T. FAULK, Administrator of the Succession of Vincey Martin, v. JAMES PINNELL.

The *procès-verbal* of the adjudication of property sold by a Court of Probates is evidence of the sale, and no act under the signatures of the parties, is necessary to perfect it.

The *procès-verbal* of a sale, made by a Parish Judge, by which a mortgage is retained and duly recorded, is full evidence of the mortgage, except for the issuing of executory process. For this purpose, and to give to the evidence that authenticity required by law, it must be shown, that the *procès-verbal* was signed by the Judge in the presence of two witnesses, and that the note, identified with the mortgage by the *paraph* of the notary, was signed by the party. C. P. 733.

APPEAL from the District Court of Ouachita, *Willson, J.*

SIMON, J. The defendant is appellant from an order of seizure and sale, granted on the application of the plaintiff, on his filing, with his petition, a copy of a *procès-verbal* of sale, made by the Judge of the Court of Probates of the parish of Ouachita, accompanied by a note of hand, subscribed by the defendant, and signed "*ne varietur*," by the Probate Judge.

Among the errors assigned by the appellant, as apparent on the face of the record, it is stated, that the *procès-verbal*, on which the order of seizure and sale was granted, is not signed by the purchaser, nor by two witnesses, so as to make it authentic evidence, of the character amounting to a confession of judgment, necessary to obtain the order complained of.

The *procès-verbal* of adjudication, annexed to the plaintiff's petition, is only signed by the Parish Judge; and although this court has several times held, that the *procès-verbal* of the adjudication of property sold by the Court of Probates, is evidence of the sale, and that no act under the signatures of the parties, is necessary to perfect it, (5 Mart. 372,) and that the *procès-verbal* of a sale, made by the Parish Judge, in which a mortgage is retained, and duly recorded, is full evidence of the mortgage; (7 La. 460;) still such evidence, for the purpose for which it was used, in our opinion, must be of the nature required by law, for the issuing of executory process thereon; as, if it were of a different character, it would not import a confession of judgment. Code of Practice, art. 733.

We must not be understood, however, as intimating that an order of seizure and sale cannot be granted and sued out, on the production of a regular *procès-verbal* of the sale, and of the note identified with it, by being paraphed, "*ne varietur*," by the Probate Judge, when it is shown, that such *procès-verbal* of sale, was signed by the Judge in the presence of two witnesses. The presence of the witnesses to the act, and the signature of the party to the note identified with it, give to the evidence, that character of authenticity, which is the principal legal requisite for the taking out of an order of seizure and sale. Civil Code, art. 223. That authenticity must exist, and cannot be dispensed with, and this is clearly the purport of our decision in the case of *Gorton v. Gorton's Administrator*, 7 La. 478. In that case, the evidence was considered as authentic, and we may perhaps presume, that it was clothed with the necessary formalities to make it so; that is to say, that the *procès-verbal* of the sale, was passed and signed by the Judge, in the presence of two witnesses; and the note which accompanied such *procès-verbal*, being identified therewith, was considered as a part of the instrument. Here, the absence of the witnesses to the *procès-verbal*, is a fatal objection, which we cannot get over without violating a positive provision of our laws; and, we think, that the order of seizure and sale appealed from, ought not to have been granted.

The decision of this question, makes it useless to notice the other errors assigned by the appellant.

It is, therefore, ordered, that the order of seizure and sale appealed from, be annulled and avoided; the appellee paying the costs in both courts.

M'Guire and Ray, for the plaintiff, cited 5 Mart. 381. 7 La. 460.

Copley and Garrett, for the appellant, referred to the Code of Practice, arts. 733, 734. Civil Code, arts. 2231, 2232. 1 Mart. N. S. 237. 6 Ib. 466, 531. 4 La. 322, 6 Ib. 66. 1 Robinson, 408.

JAMES ERWIN v. ALFRED J. LOWRY, Curator of the vacant succession of ALEXANDER McNEIL.

The 6th article of the act of the Legislature of Pennsylvania, of the 18th of February, 1836, incorporating the Bank of the United States, fixing the rate of discount at which loans may be made by the Bank, does not apply to contracts made by it in other States of the Union. The validity of such contracts must be tested by the laws of the place where they may have been entered into.

The holder of a note secured by mortgage, signed by one since deceased, cannot obtain an order of seizure and sale. He is only entitled to a judgment to be paid *in concursu*, according to his rank relatively to the other creditors, and in the due course of administration.

APPEAL from the Court of Probates of Madison, Downes, J.

BULLARD, J. This case turns mainly upon the question, whether the notes sued on, which it is alleged were given originally to the Bank of the United States of Pennsylvania contracting in Louisiana, be tainted with usury. They bear interest upon date, at the rate of eight per cent per annum.

The charter of that Bank declares that, "the rate of discount at which loans may be made by said Bank within this Commonwealth, shall not exceed one-half of one per centum for thirty days."

We had occasion, in the Eastern District, during the late term, to consider this question, and we then held, that the clause in the charter, does not apply to contracts which the Bank may make in other States of the Union, where they are authorized to contract either by law, or by the comity of nations, and that the validity of such contracts must be tested by the law of the place where they are entered into. We are not satisfied, that we were then in error. See *Frazier and another, Receivers, &c., v. Willcox*, 4 Robinson, 517.

But it does not follow that the plaintiff is entitled to a judgment in the ordinary form. The action is against a succession. The plaintiff is not, therefore, entitled to an order of seizure and sale, but must be paid *in concursu*, according to his rank in relation to the other creditors, and in the due course of administration.

It is, therefore, adjudged and decreed, that the judgment of the

Stone v. Minor.

Court of Probates be reversed, and that the notes sued on, and described in the petition, be set down and admitted as a valid and legal mortgage claim, against the estate administered by the defendant, and that the same be paid in due course of administration; and that the costs of the appeal be paid by the estate.

Snyder, Dunbar, Hyams, and Elgee, for the appellant.

Bemiss, for the defendant.

WILLIAM P. STONE v. WILLIAM B. MINOR.

A judgment rendered against one in another State, in an action in which the defendant, after having pleaded, withdrew his plea, is not a judgment by default, in the meaning of art. 747, of the Code of Practice, and an order of seizure and sale may be issued thereon. A judgment by default, according to the laws of this State, takes place only where the defendant has neither appeared, nor answered.

Cases which would be decided according to the laws of another State if in evidence, must, in the absence of proof of those laws, be governed by our own.

APPEAL from the District Court of Madison, *Willson, J.*

Snyder, for the plaintiff.

Dunlap, for the appellant. The judgment in Mississippi was by default, and will not support proceedings *via executiva*. Code of Practice, art. 747. To take the case out of the rule laid down by this article, there must have been a judgment on a plea, or defence. 8 La. 294. 10 Ib. 193, 220, 381. 1 Kent, 260. Under the decision in *Pillet v. Edgar and others*, 4 Robinson, 274, executory process cannot be issued, the foreign judgment not having been revived by *scire facias*, though more than a year had elapsed since it was rendered.

MORPHY, J. The defendant has appealed from an order of seizure and sale, rendered upon a judgment obtained by the plaintiff in the State of Mississippi. He has assigned as errors apparent upon the face of the record: 1st. That the Mississippi judgment was rendered by default, and cannot be made executory in this State, under art. 747, of the Code of Practice, but that the plaintiff must resort to an ordinary suit.

2d. That the judgment was rendered in January, 1840, and that more than one year has elapsed without any execution having been issued under it, and without its being revived by a *scire facias*.

I. From the record of the judgment obtained in Mississippi, which is part of the record before us, we cannot consider that judgment as one rendered by default within the meaning of art. 747, of the Code of Practice. The defendant, Minor, who was sued jointly with one Philip Dixon, appeared by counsel in the Circuit Court of Warren county, and made a plea equivalent to the general issue under our laws. Shortly after, the parties all appeared in court, and upon a suggestion of the death of Philip Dixon, the suit was abated as to him, and the defendant withdrew his plea, whereupon the judgment in question was entered up against the latter. This withdrawal of his plea by the defendant, and abandonment of his defence, gave the judgment rendered upon it, rather the character of a judgment by confession, than one taken by default. According to our laws, a judgment by default takes place only where there is no appearance, or answer on the part of the defendant.

II. On the second point, the record shows, that a *feri facias* was issued on the judgment in February, 1840, and was returned, "*nulla bona*," in April following. Whether, under such circumstances, it is necessary to revive a judgment by means of a *scire facias*, we are uninformed. It would seem, that such a return repels the presumption of payment or satisfaction, which may result from the lapse of one year without any further action on the part of the judgment creditor. But be this as it may, the laws of Mississippi are not in proof before us, and we must be governed by our own laws, which consider such a judgment as being in full force and effect until satisfied.

Judgment affirmed.

Tutorship of Mary Melinda Wilds.

In the matter of the TUTORSHIP of MARY MELINDA WILDS.

Where pending an appeal from a judgment removing a tutrix, the minor marries, thereby emancipating herself, the appeal, being thus without an object, will be dismissed.

APPEAL from the Court of Probates of Ouachita, *Lamy, J.*
McGuire, for the under-tutor, praying for the removal.
Garrett, for the appellant.

SIMON, J. This suit was instituted for the purpose of removing Elizabeth Ross from the tutorship of her granddaughter, Mary Melinda Wilds. Judgment was rendered below, depriving her of the tutorship, and she has taken this appeal.

During the pendency of the appeal, it was made to appear to the satisfaction of this court, that the minor to whom the defendant was tutrix, had married one Clarke McDowell, in consequence whereof she was no longer under the control or authority of her tutrix; whereupon the said Clarke McDowell and his wife were made parties to this appeal.

It is clear, that the present appeal is now without any object, and that, under the circumstances, it should be dismissed at the costs of the appellant.

Appeal dismissed.

THE COMMERCIAL BANK OF NATCHEZ v. DORINDA DAYTON.

APPEAL from the District Court of Concordia, *Curry, J.*
F. H. Farrar, for the plaintiffs.
Sanders and Frost, for the appellant.

BULLARD, J. Dorinda Dayton is appellant from a judgment against her, as surety of one Gibson, on a promissory note, made payable to the order of the Commercial Bank of Natchez.

The defence is, that the note sued on was given for a balance due on one formerly given by the same party, which was partly paid by a shipment of cotton; that, in fact, it was a loan upon

cotton, the Bank making an advance of sixty or seventy dollars per bale. It is alleged by the defendant, that the Bank had not given credit for as much as they ought to have done, in liquidating the balance due upon the first note; and that the owner was entitled to the benefit of the domestic, as well as foreign exchange, but that the Bank did not allow it, and was thereby guilty of usury.

The facts attending the transaction are drawn out of the officers of the Bank by a series of interrogatories, and appear to be, substantially, as follows: That Gibson gave his note, with the present appellant and others as sureties, for \$6360 42, payable on the 10th of January, 1839. This note was given for \$5940, current bank notes, payable on demand, and the interest at seven per cent. That Gibson, the drawer, shipped to Reynolds, Byrne & Co., of New Orleans, ninety-nine bales of cotton, which were re-shipped by them to Liverpool, to be sold on account of Gibson, the proceeds to be subject to the order of the Commercial Bank of Natchez. It was agreed, that the Bank was to draw for the proceeds in the usual way, and credit on said note of \$6360 42, the amount of the proceeds, together with any exchange that might be obtained on the bills drawn for the same, either at New York, Philadelphia, or New Orleans, at either of which places the bills might be sold. That the cotton was sold in Liverpool, and an account of sales rendered to Gibson, for £1010 16s. 7d., nett proceeds, after deducting charges, £771 19s. 1d. The charges on the cotton in New Orleans amounted to \$247 15, leaving the nett proceeds \$3183 75, exclusive of exchange. That Gibson was allowed credit on this note at its maturity for \$3667 14, being the above balance, the amount of exchange, and interest on the same, up to the maturity of the note. It appears, that the full benefit of the foreign exchange was given to Gibson but that the plaintiff derived the benefit of the domestic exchange by placing funds without charge in Philadelphia, but as the funds were used there, it cannot be ascertained with certainty how much.

It is contended, that this constitutes usury: that over and above the legal rate of discount, the Bank received all the advantage of the domestic exchange, and did not account for it when the new note was given. To this it may be answered, that there is no

Franciscus v. Surget.

evidence of any agreement between the parties as to the domestic exchange, nor is it shown whether the exchange was favorable or unfavorable to the Bank. The defendant has, therefore, in our opinion totally failed in making good her defence.

Judgment affirmed.

EASTERN N. FRANCISCUS v. FRANCIS SURGET.

An affidavit to disprove one made by the opposite party, for the purpose of removing a case from a State Court to a Circuit Court of the United States, under the 12th section of the act of Congress of the 24th September, 1789, is inadmissible. The citizenship of the parties is a fact to be shown to the satisfaction of the court, and this showing is necessarily *ex parte*. The order of removal is not final; it is for the United States Court to decide ultimately upon its jurisdiction, which may remand the case to the State Court, should it think itself without jurisdiction.

APPEAL by the plaintiff from an order of the District Court of Concordia, *Willson, J.*

Sanders, Frost, and Stockton, for the appellant, cited 2 Cranch, 9. 3 Dallas, 382. 3 Day, 294. 4 Dallas, 12, 22.

Shaw and Stacy, for the defendant relied on the case of *Stoker v. Leavenworth et al.*, 7 La. 390; citing also, 6 Peters' Reports, 762, and 1 Peters' Digest, p. 494, Nos. 8, 12.

BULLARD, J. This is an appeal from an order of the District Court, removing the cause to the Circuit Court of the United States, in pursuance of the provisions of the act of Congress. The defendant presented his petition to that effect, together with his affidavit that the plaintiff is a citizen of Louisiana, and the defendant a citizen of the State of Mississippi, and that the matter in dispute exceeded five hundred dollars. This showing appeared satisfactory to the court.

The plaintiff, it appears from a bill of exceptions, offered to file an opposition, together with his affidavit, which was refused. In the case of *Stoker v. Leavenworth et al.*, 7 La. 390, we held, that

counter affidavits were inadmissible. But in this case, admitting the affidavit, it is clear that the citizenship of the plaintiff is made out. He makes himself out a native citizen of Maryland, and his own petition shows his residence in Louisiana. Now a citizen of Maryland residing in Louisiana, is essentially a citizen of Louisiana.

The various decisions to which our attention has been called, showing that in the Courts of the United States, the uniform rule is, that the jurisdiction of the court, *jure personarum*, should appear clearly from the record, and especially, that the citizenship of the parties shall be distinctly alleged, are fully recognized. But these principles cannot apply to cases like the present, before they are removed from the State Court; otherwise, it would be in the power of the plaintiff, by keeping out of view the citizenship of the parties, to defeat the right of removal. It appears to us, that the citizenship of the parties, is one of the facts which is to be shown to the satisfaction of the court; and that the showing is necessarily *ex parte*. But the order of removal is not final. It is for the Federal Court to decide ultimately upon its jurisdiction; and if it should appear to that court, that it is without jurisdiction, the case will be remanded to the State Court.

Upon the whole, we have attentively considered the arguments addressed to us on this question, but they have failed to satisfy us, that the court proceeded upon a mistaken idea of the law in the cases reported in 4 Mart. N. S. 344, and in 7 La. 390; and we adhere to the principles therein settled.

Judgment affirmed.

Tanner, Administrator, v. Tanner.

ROBERT LINN TANNER, Administrator of the Succession of
William B. Pearce, v. ASA TANNER.

The wages of an overseer are to be paid out of the product of the crop of the year, in preference to the claims of the lessor. C. C. 3226.

A lessor, though entitled to retain the things on which his lien exists, must, in order to be paid, have them sold in the manner provided by law; and if any conflict arise, from adverse claims to the proceeds, a distribution must be made as provided by the 6th chapter of the 21st title, of the third book of the Civil Code, establishing the order in which privileged creditors are to be paid.

APPEAL from the District Court of Rapides, *King, J.* Three other cases were consolidated with this in the lower court, two of them being actions by overseers for their wages for parts of the current year, and the third a suit by another lessor of land occupied by the defendant. The Judge of the District Court ordered the claims of the overseers to be paid by preference to those of the lessors, out of the crops and utensils of husbandry seized on the premises. Tanner, as administrator of W. B. Pearce, alone appealed.

Brent and O. N. Ogden, for the appellant.

Dunbar, Hyams and Elgee, contra.

MORPHY, J. The only question which this case presents for our solution is, whether the lessor, or the overseer has the superior privilege on the crop of a plantation leased to the defendant. Article 3184 of the Civil Code, in enumerating the debts which are privileged on certain moveables, mentions the salaries of the overseers for the year last past, and so much as is due of the current year, on the product of the last crop, and the crop in the ground. It mentions also the rents of immoveables, and the hire of slaves employed in working the same, on the produce of the crop of the year, &c. This article only declares these two privileges to exist on the same thing, without making any provision in case of a conflict between them; but article 3226 of the same code provides that, "with regard to the crops which are subject to the lessor's privilege, the expenses for seed and labor, the wages of overseers and managers, are to be paid out of the product of the year, in preference to the lessor's debt." The language of

this article is so plain, that it does not seem to admit of any controversy. The reason for the preference it gives to the overseer's wages over the rent of the lessor, is obviously, that it is the labor of the former which procures, or contributes to procure to the latter the subject matter on which he may exercise his privilege. But it is contended, that the right of the lessor is of a higher nature than a mere privilege; that the latter can be enforced only on the price of the moveables subject to it, while the lessor may take the effects themselves on which his lien exists, and retain them until he is paid. *Ib.* art. 3185. This right of detention which is a part of the lessor's remedy, affords him to be sure, much greater security; but, like the pledgee, and the creditor having only a privilege, he must have the thing subject to his lien sold in the manner provided by law. When this takes place, if a conflict should arise, in consequence of adverse claims on the same fund, a distribution of it must be made pursuant to that chapter of the code which treats of the order in which privileged creditors are to be paid. See Art. 3224, and the following, among which is article 3226, so clearly decisive of this controversy.

Judgment affirmed.

ELIZABETH OLIVER v. FRANCIS OLIVER, her Husband.

Prima facie evidence of the claims of the wife is not sufficient to authorize her to obtain a judgment against her husband, when those claims are to be settled and liquidated contradictorily with the creditors of the husband, or third persons, as to whom the proof must be conclusive. She must show that money alleged to have been received by him, was paid into his hands, or converted to his individual use. C. C. 2367.

APPEAL from the District Court of Rapides, King, J. Benjamin Story, who had intervened in this case, is appellant from a judgment in favor of the plaintiff for the reimbursement of certain sums alleged to have been received by the defendant, as her paraphernal property, recognizing her legal mortgage therefor on all the immoveables and slaves of the husband, and authorizing

Oliver v. Her Husband.

her to administer her property separately. The defendant admitted the receipt of the money.

Brewer, for the plaintiff.

Brent and O. N. Ogden, for the appellant. No counsel appeared for the defendant.

SIMON, J. This is an appeal, taken by one of the defendant's creditors, from a judgment rendered in favor of the plaintiff against her husband, for certain sums of money, alleged to have been received by the defendant, as the paraphernal funds of his wife. The appellant intervened in this suit, for the purpose of making opposition to the claims set up by the plaintiff. His opposition contains allegations of fraud and collusion.

1st. The only evidence adduced by the plaintiff in support of her claims, consists : 1st. In an act of partition, executed on the 12th of January, 1835, in which it is recited that, "the heirs of Wm. Ogden, deceased, desirous to make a provisional partition, of so much of the funds and debts of said estate, as can at this time be divided, agree that a provisional partition be made among them, of forty thousand dollars, &c. and out of which plaintiff is entitled to receive \$2500, &c." This act does not say, that the several sums of money therein mentioned, were paid to the heirs ; nor does it show that the defendant received the amount coming to his wife. 2d. In an act of sale, made by the husband and wife, on the 18th of September, 1833, of certain property said to belong to the plaintiff, as her paraphernal property ; which was sold for the sum of \$1900, which is stated in the deed "to have been paid in hand, by the vendee to the said Oliver and wife, the receipt whereof is hereby acknowledged." This is the only proof of the husband's having received this sum.

The appellant has contended, that this evidence is insufficient to establish the fact of the money's having been received by the defendant in the right of his wife ; and that it is necessary, in order to entitle her to recover, that she should prove that the money has really been counted to the husband, at the periods from which her legal mortgage is to take effect.

This court has several times had occasion to recognize the rule, that *prima facie* evidence of the claims of the wife, is not sufficient to authorize her to obtain judgment thereon against her

husband, when her claims are to be settled and liquidated contradictorily with the husband's creditors, or third persons ; and that as to them, the proof must be conclusive. 7 Mart. N. S. 406. 1 La. 373, and 12 La. 303. Now, in this case, the act of partition only goes to show, that the sum coming to the plaintiff amounted to \$2500. This was the result of the division of the money ; but it does not include the idea that the husband received the share of his wife, as established by the act. This fact should have been shown by other and more conclusive evidence. As to the sum of \$1900, recited in the deed of sale, to have been paid jointly to the husband and wife, as the proceeds of her paraphernalia, we are not ready to say, that the recital in the deed, should be taken as sufficient evidence of the receipt of the whole amount by the husband ; and it seems to us that, according to our decision in 11 La. 558, she should have shown that the sum received has been put in her husband's hands, or was converted to his individual use. This is positively required by art. 2367 of the Civil Code, which grants a legal mortgage in favor of the wife, on the property of her husband, for the reimbursing of the proceeds of the sale of her paraphernal effects, only when it is shown that the husband has received the amount thereof, or has otherwise disposed of the same for his individual interest. This fact was not established by the evidence under consideration.

We think, however, that, as the plaintiff, under the opinion of the lower court, may have thought it unnecessary to adduce other proof of her rights and claims, she should not be precluded from producing any further evidence which it may be in her power to offer, according to the principles above recognized ; and that justice requires this case should be remanded for further proceedings.

It is, therefore, ordered that the judgment of the District Court be annulled, and reversed, and that this case be remanded for further proceedings according to law ; the plaintiff and appellee paying the costs of the appeal.

THE RED RIVER RAIL ROAD COMPANY v. JOHN G. YOUNG.

APPEAL from the District Court of Rapides, King, J. The plaintiffs were incorporated by an act approved the 2d of April, 1835; and they sue to recover two instalments of five per cent, on a subscription to the stock of the Company to the amount of \$5000, made on the 20th of the same month. The plaintiffs are appellants from a verdict and judgment in favor of the defendant.

Brent and O. N. Ogden, for the appellants.

Elgee, for the defendant. The plaintiffs seek to recover from the defendant \$500, being ten per cent on fifty shares of stock of the Company, which they allege he subscribed for, and which he contracted, at the time of subscribing, to pay.

If it can be shown, that at the period of subscribing, there were no persons authorized by law, with whom the defendant could contract, the court must decide, that there could be no valid obligation on the part of the defendant, there not being that *aggregation* which is essential to the formation of a contract.

On the 2d of April, 1835, (see Acts of 1835, p. 194,) the act incorporating the Red River Rail Road Company was approved by the Governor. On what day it was published in the State Gazette, does not appear; but it is clear, that supposing it to have been published the day after its passage or approval, the 3d of April, 1835, *it was not a law in the parish of Rapides until the 3d of May, in the same year.* (See Bullard & Curry's Digest, p. 541.) Yet on the 20th of April, 1835, only *eighteen days* after the approval of the act by the Governor, certain persons therein named as Commissioners for Alexandria, in that parish, assumed to act as such, and did sit, and receive subscriptions under color of a law, which, legally speaking, was in fact no law.

These Commissioners, then, could not validly contract for the Company. Their only authority for so doing was under the law, which, as has been seen, was not in operation. So far, then, as the defendant is concerned, his contract with these Commissioners was a *nudum pactum*; for since they could not legally give him a title

The Red River Rail Road Company v. Young.

to fifty shares of stock, so neither can they, or the Company, on the other hand, sue him for a performance of his contract.

Supposing the defendant, on the 20th of April, 1835, to have said that he was willing to take fifty shares in the stock of the Company, who, on that day, was authorized to accept of his proposition? No one; and yet, without an acceptance, there is no contract.

The other grounds of defence are waived.

MARTIN, J. The plaintiffs are appellants from a judgment, which rejected their claim on the defendant, for two instalments of two hundred and fifty dollars each, on his stock in the Company.

He pleaded, that the suit ought to have been brought in the name of the President, Directors and Company; that it could only be brought on the authorization of the Board of Directors; and that there is no such Board legally instituted. He denied that he was a stockholder, and pleaded the general issue.

The suit is rightly brought in the name given to the Company by its charter. It appears that the defendant took stock in the Company. The charter required an instalment of two hundred and fifty dollars at the time of the subscription, and another of the same amount at a subsequent period, which is long ago elapsed. It has been contended, that as the charter required the payment of one instalment at the time of subscribing, the Commissioners had no right to dispense therewith, and that so the subscription became without effect. The neglect of the Commissioners to demand, and of the defendant to effect the payment of the first instalment, might have been urged against him as a ground to annul his subscription; but he cannot be permitted to avail himself of his own wrong in delaying the payment. He has further urged, that the Board did not publish the advertisement required by the charter, on their call for partial payment from the subscribers. The two instalments claimed are demanded under an express provision of the charter, and not in virtue of any call of the Board.

It is, therefore, ordered, that the judgment be annulled and reversed, and that the plaintiffs recover from the defendant the sum

Pinckney v. Mulhollan.

of five hundred dollars, with interest, at the rate of five per cent, from the inception of this suit, and costs in both courts.*

CAROLINE L. PINCKNEY v. CHARLES MULHOLLAN.

The paraphernal property of a married woman is presumed by law to be under the management of her husband, unless administered by her separately and alone. C. C. 2361, 2362.

APPEAL from the District Court of Rapides, *King, J.*

Dunbar, Hyams and Elgee, for the plaintiff.

Brent and O. N. Ogden, for the appellant.

SIMON, J. The defendant is appellant from a judgment which condemns him to pay to the plaintiff the sum of \$500, the amount of a note drawn by him, and made payable to the order of J. B. Scott, and his wife Caroline L. Scott, the present plaintiff, and endorsed over to the latter by the syndic of J. B. Scott's insolvent estate.

The defence set up is, that the defendant has fully paid and extinguished said note; that after having paid it, he repeatedly called upon J. B. Scott to deliver up said note, which Scott always promised to do, alleging as the cause of not doing so, that he had mislaid it; but that he, said defendant, has never been able to get it from Scott.

Interrogatories were propounded by the plaintiff to the defendant, the answers to which show, that the note sued on was given in part consideration of the price of a plantation, of which a donation was made to the plaintiff by one William Miller; that the

* *Elgee*, for a re-hearing. The points on which the court has decided this case, were not considered tenable, and were, on reflection, expressly waived. No notice has been taken of the argument on which the defendant solely relies, to wit, that the Company had no legal existence at the date of the subscription. A re-hearing is prayed for exclusively on that point.

Re-hearing refused.

defendant paid J. B. Scott the amount of the note, one year after its date ; and that Scott promised to leave said note with B. Chew, for which Chew was to give a note he held of said Scott in exchange, &c.

The evidence further shows, that after Scott's death, the note was found to be in the hands of the plaintiff ; that it was not found among the papers of the deceased ; and that it was subsequently presented for payment by the plaintiff to the defendant, who said he had paid it, but that after being told that the note was a debt due to Caroline L. Scott, and could not be offset, or compensated by a debt due by J. B. Scott, the defendant promised to pay it. Several other facts have been disclosed in support of the plea of payment, which it is unnecessary to notice.

The evidence shows, in substance, that the note sued on was the paraphernal property of the plaintiff ; and no proof has been adduced that it ever was in the possession, or under the control of her husband at any time after it was executed.

We think the District Judge did not err. It is clear, that although the paraphernal estate of a married woman is by law considered to be under the management of the husband, this presumption necessarily ceases when it is administered by the wife *alone and separately*. Civil Code, art. 2362. 18 La. 433. The wife has the right of administering her paraphernal property, Civil Code, art. 2361 ; and it seems to us, that the best proof of such separate administration is, when she keeps the property in her possession, and out of the control or interference of her husband. Here, it appears that the note sued on never was in the possession of the husband ; that is to say, it is not shown that he ever had any control over it. It was not found, after his death, among the papers of his succession ; and the endorsement of the syndic of his insolvent estate shows, that it was so far the separate property of the wife, as not to be considered by J. B. Scott's creditors as part of the property by him surrendered. Under such circumstances, we feel bound to say, that the defendant's plea of payment cannot avail him. It was a very great imprudence, on his part, to have paid the note without its being presented ; and the fact of J. B. Scott's saying that the note was mislaid, was,

McLean v. Carroll and another.

it seems to us, sufficient to put the defendant on his guard, as it ought to have induced him to believe, or at least to suspect, that it was not then in J. B. Scott's possession. The plaintiff is clearly entitled to recover.

Judgment affirmed.

STEPHEN McLEAN v. SARAH CARROLL and another.

Any error committed by a Justice of the Peace, in proceedings on an application for the removal of a tenant under the act of 3 March, 1819, relative to landlord and tenant, can only be corrected by an appeal to the Parish Court, or by an action of nullity. In case of the refusal of the Justice to allow an appeal, the remedy is by mandamus. An injunction will not lie from a District Court, to stay the proceedings under such a judgment of removal.

APPEAL from the District Court of Natchitoches, King, J.

Hertzog and Tuomey, for the appellant, cited in support of the injunction, arts. 296, 298, No. 3, and 303, of the Code of Practice, and *Denis v. Leclerc*, 1 Mart. 297.

Carr, M. C. Dunn, and *J. Taylor*, for the defendants, relied on the act of 3 March, 1819, relative to landlord and tenant. Civil Code, art. 2683. 8 Mart. N. S. 563. 6 La. 58.

MARTIN, J. The plaintiff obtained an injunction to stay the proceedings of the defendant, Sarah Carroll, upon a judgment rendered by a Justice of the Peace in her favor, against him, for his removal from a tract of land, which he alleges, that the defendant and her husband leased to one Clark, who underlet it to the plaintiff. He urges, that the said lease has been, without his fault, mislaid or lost; that it has been duly advertised, notwithstanding which the Justice refused leave to produce evidence of its loss and contents; that Justices of the Peace have no jurisdiction of cases in which the possession or title of real property comes into question, except between lessor and lessee; that the defendant Carroll, in her said suit before the Justice, denied, that she was a lessor and the present plaintiff a lessee, opposing the introduction of evidence of the lease; and further, that he has

Thomas and another v. Cortes and another.

made improvements on the premises for which he is entitled to payment, before being compelled to abandon the premises. The District Court dissolved the injunction, and ordered the execution of the judgment; and the plaintiff has appealed.

Our attention has been drawn to a bill of exceptions, taken by the plaintiff and appellant to the refusal of the District Court to admit evidence of the existence of the lease, its loss, and contents, and of the value of the improvements.

It does not appear to us that the District Judge erred. The error of the Justice was only to be corrected by an appeal to the Parish Court; and if that was refused, the remedy was by a mandamus. The District Court could not take cognizance of the Justice's judgment, on an appeal. The defendant has placed on the record evidence of his being an underlessee, and his adversary his lessor. It is true, that he alleges on oath, in his petition for the injunction, that the present defendant did not seek a judgment against him as her underlessee. This, however, is contradicted by an agreement between him and her, in which it is admitted, that her suit against him before the Justice of the Peace, was instituted *on a lease*. The plaintiff and appellant has evidently mistaken his remedy. The judgment of the Justice forms against him a *res judicata* the effect of which can be arrested only by an appeal, or an action of nullity, neither of which can be brought in the District Court. He could not be relieved by an injunction.

Judgment affirmed.

GEORGE C. THOMAS and others v. JOHN F. CORTES and others.

Where a defendant in an action to recover a sum of money dies *pendente lite*, if the heirs be of age and have accepted the succession unconditionally, they may be made parties, and the suit must be prosecuted to judgment in the ordinary courts; but where the succession has not been accepted purely and simply, and is in the hands of an administrator, curator, or executor, Courts of Probate have exclusive jurisdiction to decide on all claims for money against it, and to establish the rank of the privileges, and the mode of payment. C. P., 924.

It does not follow from the provisions of arts. 21, 130, and 361 of the Code of Practice,

Thomas and others v. Cortes and others.

that actions shall not abate by the death of one of the parties, but may be continued between the survivor and the heirs of the deceased, that they must continue to be prosecuted in the courts in which they were instituted. All such actions founded on claims for money, on the death of the defendant, must be cumulated with the mortuary proceedings in the Probate Court, and there prosecuted to judgment, unless admitted by the administrator. The creditors have the right of contesting each other's claims in a *concurso*, before the Probate Court, by which they will be paid a *pro rata* dividend in case of the insolvency of the succession. Though no express provision has been made for the transfer of such actions, the law has, by investing the Court of Probates with jurisdiction, impliedly conferred the means necessary to its exercise. The transfer of the record is necessary to the exercise of jurisdiction by the Probate Court.

APPEAL from the District Court of Natchitoches, *Greeneaux*, J. presiding.

J. Taylor, for the plaintiffs.

M. Boyce, Tuomey, and Sherburne, for the appellant.

MORPHY, J. This appeal is taken by the widow and administratrix of the succession of the late Samuel P. Russell, from a judgment rendered by default, and afterwards confirmed against her in her said capacity, her husband having died *pendente lite*. The suit was against the deceased as endorser of a promissory note. Among a number of errors and irregularities which the appellant has assigned as apparent upon the face of the record, it is sufficient to notice one, to wit : that the District Court had no jurisdiction of the case, as far as it related to the succession of S. P. Russell ; that it could give no judgment against an administratrix for sums of money due by a succession ; and that the suit should have been transferred to the Court of Probates. This ground appears to us well taken. It is true, that articles 21, 120, and 361 of the Code of Practice, declare that actions do not abate by the death of one of the parties, and that they may be continued between the surviving party, and the heirs of the one deceased ; but it does not necessarily follow, that such actions must continue to be prosecuted in those courts whose jurisdiction has been excluded by law.

If the heirs are of age, and have accepted the succession unconditionally, they may be made parties, and the suit must be prosecuted to judgment in the ordinary courts ; but when the succession has not been accepted, purely and simply, and is administered upon by an administrator, the Courts of Probates have exclu-

sive jurisdiction to decide on all claims for money against it, and to establish the order of privileges, and mode of payment. Code of Practice, art. 924.

The Legislature having given exclusive jurisdiction of such claims to the Courts of Probates, it follows, that the jurisdiction of other courts is thereby taken away, and that all suits on them pending in such other courts, must be cumulated with the mortuary proceedings in the Court of Probates, and there prosecuted to judgment, unless the claim is admitted by the administrator. A *concurso* takes place in the Court of Probates, in which the creditors have the right of contesting each other's claims, and can receive only a dividend on their debts in case the estate proves insolvent. Under this view of the case, effect is given to the apparently contradictory articles of the Code, and the will of the lawgiver is complied with. It is true that the Legislature has not provided for the transfer of such suits, but as this court said in *Prentice et al. v. Waters*, "in taking away the jurisdiction of one court, and vesting it in another, the last has been virtually possessed of the means of exercising its jurisdiction, and that must be by the record being sent to it." *Cum quid conceditur, conceditur et id per quod pervenitur ad illud.* 3 Mart. N. S. 522; 2 Ib. N. S. 287, 439; 11 La. 359.

It is, therefore, ordered, that the judgment of the District Court be reversed, and that this case be remanded, to be transferred to the Court of Probates of the Parish of Natchitoches; the plaintiffs and appellees to pay the costs in both courts, but reserving to them the right to claim in the Court of Probates, those incurred in the District Court.

Judgment affirmed.

ROBERT F. MCGUIRE v. BARNET G. WOOLDRIDGE and others.

Action by the transferee after maturity, against the endorsers of a promissory note, executed by the maker for the price of land purchased by him from the payee, and secured by mortgage on the property sold. To enable the maker to secure, by a mortgage of the property, the payment of notes to be given by him to a Bank, in discharge of a debt due by the payee to the Bank, thereby substituting the maker to the payee as debtor to the Bank, the latter, the vendor, executed an act "releasing the mortgage given by the maker," with a stipulation "that the release shall be null and void, unless the mortgage tendered by the maker be accepted by the Bank" within a fixed period. *Held*, that the substitution of the maker as a debtor to the Bank, was a sufficient consideration for the contract of release; that the payee was precluded by the act from exercising his rights on the note and mortgage, until the expiration of that time; that the endorsers were sureties of the maker; but that whether considered as such, or as mere endorsers, the act having been executed without their assent, they were discharged. C. C. 3030, 3032.

The holder of a note must retain the faculty of transferring all his rights against the maker absolutely unimpaired, or the endorsers will be released. He must not agree to give time, and suspend his remedy by precluding himself from suing the maker.

If the holder of a note secured by mortgage, appears at the meeting of the creditors of an insolvent, and votes for a sale of the mortgaged property on terms of credit, he will thereby release the endorser.

A surety has the right to stand upon the very terms of his contract. The creditor has no right to make any change, though beneficial to the surety, under the penalty of releasing him.

APPEAL from the District Court of Caldwell, *Curry, J.*

McGuire, pro se, relied on the case of *Huie v. Bailey*, 16 La. 216, and the cases there cited, and 19 La. 211.

I. Garrett, for the appellants. There was a sufficient consideration for the contract of release. 6 Peters, 251. *Calliham v. Tanner*, 3 Robinson, 299. 3 Mart. N. S. 596. The release having been by public act, was binding without a consideration. Civil Code, arts. 1523-1525. It is no answer that the arrangement may have been beneficial to the surety. He has a right to stand upon the very terms of his contract. 9 Wheaton, 680. 5 Peters' Condens. Rep. 728. *Lobdell v. Niphler*, 4 La. 294. 7 Mart. N. S. 13. *Millaudon v. Arnous et al.*, 3 Mart. N. S. 598. Civil Code, arts. 3030, 3032.

SIMON, J. Two of the defendants, James A. Wooldridge, and

W. P. Snow, are appellants from a judgment rendered against them, *in solido*, as endorers of certain notes drawn by Barnet G. Wooldridge, their co-defendant, in consideration of the price of certain property situated in the town of Columbia, sold to the latter by one Stokes, who, sometime after the notes became due, transferred them to the plaintiff. The notes sued on, were due on the first of April and twenty-first of May, 1840; were secured by a mortgage reserved on the property sold, and were transferred by notarial act to the plaintiff on the 13th of November, 1841. They had been duly protested at maturity.

The appellants pleaded their discharge on the following grounds: That the notes sued on, having been endorsed by them as sureties of the principal debtor, who purchased the property, were received by Stokes, who retained a special mortgage on the property sold, for the payment thereof. That the endorers were released by the act of said Stokes, who, while he was holder of the notes, and after they had become due, gave expressly an extension of time to the principal debtor, from the 9th of April, 1841, until the first of October following, and executed a release of the mortgage given by the purchaser to secure the payment of said notes, all which, was done without the consent of the sureties and endorers.

There was judgment below in favor of the plaintiff, for the balance due on the notes.

The notes sued on bear even date with the deed of sale, and are identified with it; they were made payable and negotiable at the office of discount of the New Orleans Gas Light and Banking Company, at Harrisonburg; and were transferred to the plaintiff, long after they became due.

The evidence shows, that on the 9th of April, 1841, a certain act of release was executed by Stokes in favor of the purchaser, in which it is declared and acknowledged that he, the vendor, does by these presents hereby release, annul, and make void the mortgage given by said Wooldridge (the purchaser of the property,) to said Stokes. The object of the act was, to enable the maker of the notes to mortgage the same property to the New Orleans Gas Light and Banking Company, for the purpose of securing the payment of notes to be given by said maker to the Bank, "in payment

of money due by Stokes to said Bank ;" and if such arrangement was made with the Bank, so as to substitute Wooldridge as debtor to the Bank, in the place of Stokes, the amount for which he should so substitute himself, was to be applied in payment or satisfaction of the original notes given by Wooldridge, the maker, to Stokes, for the purchase of the property mortgaged. It is, however, further stipulated, that "this release of mortgage in favor of said Bank shall be null and void, unless the mortgage tendered by said Wooldridge, shall be accepted by the Bank by notarial act, between the date of the act of release and the first Monday in October next."

From the stipulations contained in this act of release, it appears to us manifest, that the intention of the parties was to suspend all action upon the notes sued on and the mortgage, until the expiration of the time allowed for procuring a novation of the debt due by Stokes to the Bank. Until then, the mortgage was to be considered as released ; and until then, Stokes was undoubtedly precluded from exercising his rights upon the notes, as well as upon the mortgage. The transaction between the parties amounted to a delay of six months, allowed by the creditor to the principal debtor, to enable him to make the arrangement with the Bank, which would have the effect of extinguishing the obligation contracted by Stokes towards the Bank, by substituting thereto the new obligation of said debtor, who, thereby, was to be discharged from the debt he formerly owed to Stokes. Nay, the mortgage given to secure the notes sued on, was to be taken as released, or not existing for the space of six months, subject to being revived, if the arrangement by novation was not completed, and accepted by the Bank, between the periods mentioned in the act.

Now, under art. 3030 of the Civil Code, the surety is discharged, when by the act of the creditor, the subrogation to his rights, mortgages, and privileges, can no longer be operative in favor of the surety ; and by art. 3032, the prolongation of the term granted to the principal debtor, without the consent of the surety, releases the latter. The appellants, though endorsers of the notes, cannot, from the evidence, be considered in any other light than as sureties, that is to say, as having endorsed the notes for the purpose of securing the payment of their amount. But,

were they to be considered as mere endorsers, they would have, on paying the notes, the same right of being subrogated to all the rights and securities of the holder; and as this court held in the case of *Millaudon v. Arnous et al.*, 3 Mart. N. S. 598, the holder of a note must retain the faculty of transferring all his rights absolutely unimpaired against the maker, otherwise the endorsers will be released. *He must not agree to give time; and suspend his remedy*, by precluding himself from suing the maker. See also 7 Mart. N. S. 13. 4 La. 295. 6 Peters, 251. Now, how could Stokes have transferred his rights unimpaired to the appellants? Had he not consented to the conditional release of the mortgage? Could he have subrogated them to his rights, mortgages and privileges, and could such subrogation have operated in favor of the appellants between the date of the act of release and the first Monday of October following? Certainly not. - Stokes was precluded from exercising his rights, and was bound to await the expiration of the time by him granted to the principal debtor. In the case of *Lobdell v. Niphler*, 4 La. 294, this court held, that if the holder of a note secured by mortgage, appears at the meeting of the creditors of the insolvent debtor, and votes for a sale of the mortgaged property on terms of credit, he thereby releases the endorser.* So it must be in this case; and the conditional release of Stokes' mortgage, and the time by him granted to carry the contemplated arrangement into execution, must also have the effect of releasing the appellants.

It has been urged, that no consideration was given for the extension of time; and that, at all events, if the arrangement had been carried into effect, it would have been beneficial to the sureties. This we cannot admit; for it is a well settled rule, that the surety has a right to stand upon the very terms of his contract, even if he should be benefitted by the change, and the creditor has no right to make any such change. 9 Wheaton, 680. 5 Peters, 728. As to the want of consideration, we cannot agree with the appellee's counsel. It is clear that Stokes was to be bene-

* But see the case of *Léger v. Arcenauz and another*, decided at Opelousas, 5 Robinson, 513.

Holmes, Under-Tutor v. Hemken and another.

fitted by the arrangement; that the substitution of Wooldridge, as debtor to the Bank in his stead, was the principal object he had in view when he granted the release; and that this important object was a sufficient consideration, if any such consideration was necessary.

On the whole, we think the Judge, *a quo*, erred, in not discharging the appellants from the obligations sued on.

It is, therefore, ordered, that the judgment of the District Court be annulled, and reversed; and that ours be in favor of the defendants and appellants, with costs in both courts.

HARDY HOLMES, Under-Tutor of Nancy Miriam Evans v. BERNARD HEMKEN and another.

It being the duty of the under-tutor to act for the minor whenever the interest of the latter is adverse to that of the tutor, he is the proper person contradictorily with whom the accounts of the tutor must be settled, and the judgment rendered on such settlement fixes the amount due to the minor; but he has no authority to execute such a judgment against the tutor, so long as the latter remains in office.

An under-tutor has no right to receive any part of the property, nor any funds belonging to the minor. If they are considered unsafe in the hands of the tutor, or if there be any sufficient cause, the under-tutor may sue for his removal and for the appointment of another tutor, who, on giving security, will be competent to enforce the minor's rights against his former tutor.

The tacit mortgage of a minor can only be enforced against his tutor, after the termination of the functions of the latter. If the minor, or his legal representative, does not then find in the possession of the tutor property sufficient to satisfy his claims, in consequence of sales by the tutor, or of executions levied on his property, his tacit mortgage may be enforced against the purchasers in the mode pointed out by art. 715, of the Code of Practice.

Where an execution has been unlawfully issued, every thing done under it, is null and void.

APPEAL from the District Court of Ouachita, Curry, J.

J. Garrett, for the appellant. The interest of the tutrix and co-tutor being opposed to that of the minor, it was the duty of the under-tutor to act. Civil Code, art. 301. *Chisholm v. Skillman*,

Holmes, Under-Tutor v. Hemken and another.

2 La. 144. 11 La. 189. *McGuire, Curator, v. Ross, Tutrix*, 12 Ib. 575. 6 Ib. 484.

McGuire and Ray, for the defendants.

MORPHY, J. The plaintiff, as under-tutor of the minor Nancy Miriam Evans, prosecutes this appeal from a judgment dissolving an injunction he had obtained to prevent the sale of two negroes, seized at the suit of the defendant, Bernard Hemken, against James Killam, on the ground, that these slaves belonged to the minor. The material facts shown by the record are : That the mother and natural tutrix of Nancy Miriam Evans, who had intermarried with James Killam, was, on the 17th of November, 1835, appointed tutrix, and her husband co-tutor to the said minor, by a family meeting. That in April, 1841, the tutrix and her co-tutor rendered an account of their administration on the estate of James E. Evans, and of their tutorship up to that day ; whereupon, after hearing the objections of the under-tutor, who had filed an opposition thereto, the probate Judge of Ouachita rendered against them, *in solido*, judgment for the sum of \$14,357 83½, which judgment was recorded on the 22d of November, 1841. On the 21st of May, of the following year, the under-tutor thought proper to sue out an execution against the tutrix, and co-tutor James Killam, to satisfy this judgment ; and the negroes whose sale is enjoined were seized, with other property of the co-tutor. At the Sheriff's sale under this execution, the under-tutor, who had obtained to that effect the authorization of a family meeting, bid for the minor \$800, on each of the two negroes in question. After the adjudication, he directed the Sheriff to credit the amount of his bid on the execution of the minor, as holding the oldest mortgage on the slaves, and demanded of him a deed of sale in favor of the minor. This the Sheriff refused to do, unless the money was paid to him. Thereupon, that officer re-advertised the sale of these negroes, at the suit of the defendant Bernard Hemken, who had previously caused them to be seized under several judgments against Killam, recorded before that of the minor, to wit, on the 3d of May, 1841. This re-sale, the under-tutor, acting under the advice of a family meeting, enjoined. He prays, that the Sheriff may be decreed to make a conveyance of the slaves to the minor, as the rightful owner of

them under the adjudication; and, in case the court should decide, that the title to said negroes is yet in Killam, that the Sheriff be ordered to apply the proceeds of the sale to the execution in his hands in favor of the minor, whose mortgage on Killam's property is older than that of Hemken.

The Judge below properly dissolved the injunction. The under-tutor, whose duty is to act for the minor when the latter's interest is adverse to that of the tutor, is the proper person contradictorily with whom the accounts of the tutor must be settled. The judgment which is rendered thereupon, fixes the amount due to the minor, and which, in the hands of the tutor, is to be administered upon; but the under-tutor is without any authority to execute such a judgment against the tutor, as long as the latter remains in office. The under-tutor has no right to receive any part of the property, or funds belonging to the minor. If they are considered unsafe in the hands of the tutor, or if there exists against the latter any sufficient cause, the under-tutor is authorized to sue for his removal, and for the appointment of another tutor, who, upon giving security, would be competent to enforce the minor's rights and claims against his former tutor. The execution in this case directs the Sheriff to seize and sell the property of the tutrix and co-tutor, and to pay the funds thus obtained to the under-tutor. The latter being clearly unauthorized to receive and administer those funds, would have had to hand them over to the tutrix and co-tutor, who were alone competent to receive them. Thus, the money made on the minor's execution would return into the hands of the very persons out of whose property it was levied. If the whole amount of the judgment was obtained in the same way, the result would be to convert into specie in the hands of the tutor, all the property on which the minor had a legal mortgage, and thus deprive him of the security provided for him by law. A proceeding which would lead to such preposterous consequences, cannot receive our sanction. The tacit mortgage of a minor can be enforced against a tutor, only at the termination of his functions, in one of the modes provided for by law. If the minor, or his legal representative, does not then find in the possession of the tutor property sufficient to satisfy his claim, in consequence of sales made by the tutor, or

Copley v. Flint and another.

of executions levied on his property, his tacit mortgage may be enforced against the purchasers in the order pointed out by art. 715, of the Code of Practice. Under this view of the case, it becomes unnecessary to examine several other questions presented by the record. If the execution was unlawfully issued, every thing done under it is null and void.

We have been requested to increase the damages awarded by the court below on the dissolution of the injunction ; but this we cannot do, as no amendment has been prayed for by the appellee as required by arts. 888, 889, 890, of the Code of Practice.

Judgment affirmed.

GEORGE W. COPLEY v. EBENEZER HUBBARD FLINT and another.

Where defendants, with a full knowledge of all the circumstances, agree to take back lands, which originally belonged to them, from plaintiff, who asserted title thereto, and to pay a certain sum as the price of such rights as the latter might have acquired, he will, on the failure of the defendants to pay the amount agreed upon, be entitled to rescind the contract, and to be reinstated in the position he previously occupied. The principle that a purchaser who acquires what he discovers to be his own is not bound to return it, nor to pay for it, though correct in the abstract, is inapplicable to such a case.

An action of rescission may be sustained by a vendor against the property in the hands of a third person, though the former may have acknowledged in the act of sale that the price had been paid, where such third person had identified himself with the first purchaser, and was aware that the price had not been paid by him.

APPEAL from the District Court of Ouachita, *Boyce, J.*

BULLARD, J. The history of the protracted controversy, of which this cause forms a new link, may be seen by reference to vol. 16 of the Louisiana Reports, p. 380, and 1 Robinson's Reports, p. 125.

The plaintiff, having failed in his action of rescission on account of lesion, prosecutes this suit against Flint, his vendee, and D. W. Cox, to whom the land had been reconveyed, demanding a rescission of his sale to Flint, and a restoration of the land sold,

Copley v. Flint and another.

on the ground, that the stipulated price had not been paid. There was a verdict and judgment against him, and he has appealed.

Our attention has been particularly called to the charge of the Judge to the Jury, which is excepted to as erroneous, and calculated to mislead the Jury. 1st. They were instructed that if the sale made by the Parish Judge, under the direction of the Police Jury, was not in accordance with the laws then in force, including the act of 1828, it did not divest D. W. Cox of his title, and Copley acquired none; the rule being, that if a buyer acquires what he discovers to be his own, he is not bound to return it, nor to pay for it. We think the Judge erred in this part of the charge. The doctrine may be correct in the abstract, but is, in our opinion, inapplicable to this case. The question of the validity of Copley's title ought not to have been made in this case. The defendants had taken back the land, under a full knowledge of all the circumstances; and one of them engaged to pay \$1000, which has never been paid. In default of the payment of that sum as the price of such rights as Copley had acquired, he was entitled to a rescission of the contract, and to be reinstated in the position he occupied before the sale to Flint. Whether Cox has, or has not, so completely identified himself with Flint, as to estop him from denying that the price promised to Copley remained unpaid, notwithstanding the acknowledgment in Copley's deed to Flint that the price had been paid, is fairly open for argument and proof; but we cannot forbear saying, that having been a party to all the suits against Flint, growing out of this transaction, in which it appeared abundantly, that the sum of \$1000 remained unpaid, we should doubt whether he could now avail himself of the admission of his adversary in his deed.

2d. This last remark applies in a great measure to the second head of the Judge's charge, which also appears to us correct as a general rule;* but the Jury ought to inquire whether, under all

* The Judge charged, in the second place, that "though the remedy of rescission exists against property in the hands of a third person, when it has been sold to his vendor on a credit, if it appear by the sale, that the price has not been paid; yet, if by the original sale the price is acknowledged, and the purchaser afterwards sells to a third party, the original vendor cannot exercise the right of rescission against the

Copley v. Flint and another.

the circumstances of the case, Cox was not aware of the fact that the price promised to Copley was not paid.

The Judge further instructed the Jury, that in his opinion, the assent of Copley to take a claim, then in the hands of Judge Peets, and if it was not paid, that Flint and Thomas would pay the \$1000, amounted to a novation of Flint's obligation as vendee, to pay the price not counted down at the time of the sale. We are of opinion, that that agreement did not amount to a novation, and that so much of the price must still be considered as unpaid.

We conclude, that the charge to the Jury being erroneous, the cause must be remanded.

It is, therefore, adjudged and decreed, that the judgment of the District Court be reversed, the verdict set aside, and that the cause be remanded for a new trial; the costs of the appeal to be borne by the appellees.

Copley, appellant, *pro se*.

McGuire, for the defendants.

GEORGE W. COPLEY v. EBENEZER HUBBARD FLINT and
another.

A power constituting one a "special and general agent and attorney in fact, delegating to him both general and special powers to manage all the business of the constituent, and more especially to draw notes and drafts, and to endorse those made by himself or others," does not authorize the agent to bind his principal as surety, *in solido*, with himself, in a contract relating exclusively to his own interests.

property in the hands of such third party, though the vendee may admit, when interrogated under oath, that the price was not paid as the deed purports. As to the third party, who acquired the property before this admission, it would be parol evidence, and not binding on him. Thus Cox would not be bound by the admission of Flint."

He further charged; "That on the day Flint received the conveyance from Copley, Flint and Thomas executed their obligation, transferring certain paper in the hands of Judge Peets of Claiborne, and agreeing if the paper was not paid by a certain time, that they would, jointly and severally, pay the same. This was the amount of the price remaining unpaid. My opinion is, that the remedy of Copley is on the agreement, and that it is a novation of Flint's obligation as vendee to pay the price not counted down at the time of the sale."

Copley v. Flint and another.

APPEAL from the District Court of Ouachita, Curry, J.

BULLARD, J. Judgment is asked, *in solido*, against the two defendants, on a contract entered into by Flint alone, assuming to act for himself, and as attorney in fact of Thomas. The instrument, which evidences this contract, recites, that Flint had given to Copley an order on Judge Peets, for a note made payable to E. H. Flint & Co. for about \$945, bearing interest at ten per cent, which note, if collected by Copley, is to go in entire satisfaction of a debt of one thousand dollars, to bear interest from the date of the agreement, which they jointly and severally promise to pay to said Copley, for a good and valid consideration. It is further stipulated, that if the note should not be collected, or realized, before the 1st of September, 1839, the above sum of \$1000 is to be considered due, with interest, and they engage to pay without suit, and with as little delay as possible. The contract is signed by Flint for himself, and as attorney in fact.

It is evident, that the contract was for the sole benefit of Flint in the purchase of a tract of land, and that Thomas was only surety.

The defendants were condemned to pay, *in solido*, and Thomas has appealed.

He was interrogated on facts and articles, and asked, among other things, whether E. H. Flint was not his duly authorized agent and attorney to sign the obligation above described. Thomas answered this interrogatory, "that he never gave E. H. Flint a special power, and unless it is contained in the annexed power of attorney, he never gave it."

Annexed to the answers is the copy of a power of attorney, dated in 1836, in which Thomas declares, that he has appointed "E. H. Flint my special and general agent and attorney in fact, hereby delegating to my said attorney, both general and special powers to manage all and singular *my* business, and more especially to make notes, draw drafts, and endorse notes, or drafts drawn by himself, the house of which he is a member, or by other persons, to check in bank or otherwise, binding myself to ratify and confirm all his acts, both as general and special agent and attorney in fact, as fully as if the same were done, made, drawn, endorsed, or accepted by me in person."

Dodd v. Crain and another.

It is to be remarked, that the authority conferred on Flint by this power of attorney, relates principally to the business and interests of Thomas. The agent is authorized more especially to make notes, draw drafts, or endorse drafts drawn by himself, or the house of which he is a member, or other persons. But it does not appear to us to empower the agent to bind Thomas as his surety, *in solido*, in a contract which concerned the interest of the agent alone in the purchase of land. An authority to endorse notes or drafts, is different from one to bind the constituent as surety, *in solido*.

We have not found in the record any evidence of ratification.

It is, therefore, ordered and decreed, that the judgment of the District Court be reversed, and that there be judgment for the defendant, Thomas, as in case of nonsuit, with costs in both courts.

Copley, pro se.

McGuire and Ray, for the appellant.

JOHN W. DODD v. ROBERT A. CRAIN and another.

Where an act by which a mortgage is retained is passed in the office of a Parish Judge, acting *ex officio* as a notary public, in relation to property within his parish, no further registry is necessary to give such mortgage effect against third persons. So of the *procès-verbal* of sale made by a Parish Judge while acting *ex officio* as an auctioneer. A Parish Judge, who acts as a notary, and as Judge of Probates, is not expected to keep a separate office in each capacity.

The clause *de non alienando* in an act of mortgage, relieves the mortgagee from the necessity of pursuing all the steps required in an hypothecary action in ordinary cases.

On an appeal from an order of seizure and sale, the only question is, whether the Judge had sufficient evidence before him to authorize his *fat*. Such an order cannot be set aside on account of subsequent irregularities in the execution of it, as not notifying the proper parties, &c. Redress must be sought by other proceedings.

APPEAL from the District Court of Rapides, King, J.
Brent, and O. N. Ogden, for the plaintiff.

Flint, and Thomas, for the appellant, as to the want of registry of the act on which the order of seizure and sale was issued, re-

ferred to *Sinnott v. Michel*, 7 Mart. N. S. 578. *Brou v. Kohn*, 12 La. 104. Civil Code, art. 3362. On the second point they cited *Nathan v. Lee*, 2 Mart. N. S. 32. *Donaldson v. Maurin*, 1 La. 29. *Nicolet's executors v. Moreau et al.*, 13 La. 314. *Lawrence v. Burthe*, 15 La. 267. *Carter v. Caldwell*, Ib. 474.

MORPHY, J. This is an appeal from an order of seizure and sale, issued upon a deed of mortgage of certain lands and slaves in the Parish of Rapides, which Lawrence P. Crain, to secure a debt due by Robert A. Crain, mortgaged to J. M. Solibellas, under the pact *de non alienando*, and which the latter transferred to the plaintiff. L. P. Crain subsequently sold the property mortgaged, to the present appellant, L. Luckett.

The case is submitted on the following assignment of errors, to wit:—

First. That there is no evidence in the record, that the mortgage upon which the order of seizure and sale was issued, was recorded in the office of the Parish Judge of Rapides, before the date of the conveyance from Crain to Luckett, to wit, the 30th of January, 1843.

Second. That even if the mortgage does affect the property in the hands of the appellant, the order of seizure and sale should be set aside, because the formalities required by law in executory proceedings have not been complied with; and, that the plaintiff could enforce his mortgage, if at all, only in two ways, either by treating the conveyance as a nullity, and proceeding against the mortgagor himself, L. P. Crain, or by proceeding against the third possessor as such, and in the manner pointed out by law.

I. The act of mortgage of L. P. Crain to the plaintiff's assignor, bears date the 15th of February, 1841, and was executed before George Richard Waters, the Judge of the Parish of Rapides acting *ex officio* as Notary Public. The copy of this act, which is annexed to the petition and made a part of it, is certified by the Judge to be a true copy of the original on file and of record in his office. This certificate bears date the 2d day of August, 1843. It is said, that the Parish Judge's certificate does not show the date of the registry; that it simply proves that the act was recorded, and that the court cannot presume that the recording was made at an earlier date than that of the certificate. We have re-

Dodd v. Crain and another.

peatedly held, that when an act, in which a mortgage is retained, is passed in the office of a Parish Judge, acting *ex officio* as Notary Public, in relation to property situated in his parish, no further registry is necessary to give such mortgage effect against third parties. This has been held, even in relation to a *procès-verbal* of sale of an auctioneer, who exercised the function *ex officio* as being Parish Judge. The Parish Judge who acts as notary, or Judge of Probates, is not expected to keep distinct offices in these several capacities. 6 Mart. N. S. 118; 2 La. 575; 7 La. 468. We will, therefore, consider the act of mortgage in this case, as recorded from its date, which is long anterior to the conveyance made to Lockett.

II. On the second point, it is only necessary to say, the well known effect of the clause *de non alienando* is, to relieve the mortgage creditor from the necessity of pursuing all the steps required by the hypothecary action in ordinary cases. As to the circumstance of the appellant being made a party to the proceedings, we think that he complains of it with bad grace. Far from depriving him of any advantage, it gives him rights which he would not have been entitled to, had the plaintiff instituted his proceedings against the mortgagor, without notice to him. But, be this as it may, the only inquiry for us, when an order of seizure and sale is appealed from, is, whether the Judge who issued it, had sufficient evidence before him to authorize his *fiat*. If he had, and any subsequent error is committed in the execution of it, by not notifying the proper parties or otherwise, redress must be sought by some other proceeding than by an appeal from the order of seizure and sale, which cannot be set aside on account of subsequent irregularities, supposed to have been committed below. 2 Mart. N. S. 32; 1 La. R. 29; 13 La. 3, 14.

Judgment affirmed.

The New Orleans and Carrollton Rail Road Company v. Crain and another.—&c.

THE NEW ORLEANS AND CARROLLTON RAIL ROAD COMPANY
v. ROBERT A. CRAIN and another.

APPEAL by Levin Luckett, one of the defendants, from a judgment of the District Court of Rapides, *King, J.*

Brent and O. N. Ogden, for the plaintiffs.

Thomas and Flint, for the appellant.

MORPHY, J. The same assignment of errors was made in this case as in that of John W. Dodd, against the same defendants, decided this day, *supra*, p. 58. The same judgment must, therefore, be given.

Judgment affirmed.

LOUIS SELBY v. MARTHA A. BENTON and Husband.

APPEAL from the Probate Court of Carroll, *Bosworth, J.*

Selby, appellant, *pro se*. *Wilson* also appeared on the same side.

Dunlap, for the defendants.

MARTIN, J. The plaintiff is appellant from a judgment against him, discharging the defendant from her liability as executrix. She claimed it in an averment that she had rendered on account of her executorship, and was finally discharged, her account having been homologated by the Court of Probates, and her bond cancelled; that Thomas V. Davis was thereupon appointed administrator of the estate of her testator, is now acting in that capacity, and is the person against whom the present action ought to have been instituted. The record contains evidence of these facts, which clearly support the judgment in favor of the defendant.

Judgment affirmed.

ANTOINE MAURIN v. JOSIAS CHAMBERS.

The statement on the face of a note, that the consideration for which it was given was the purchase of a tract of land, imposes no obligation on an endorsee to inquire whether his endorser had a good title to the property sold; nor does any such obligation result from its being endorsed, without recourse.

The maker of a negotiable note cannot urge any inquiry into its consideration, when in the hands of an endorsee, not shown to have had any knowledge of the failure of the consideration before he received it.

APPEAL from the District Court of Rapides, *King, J.*

Brent, for the plaintiff.

Dunbar, and *Hyams*, for the appellant.

MARTIN, J. The defendant is appellant from a judgment on his promissory note. He pleaded, that it was given for the purchase of a tract of land from G. & F. Chrétien, who endorsed the note to the plaintiff; that he is in danger of being evicted, a suit having been brought, and being still pending against him for that purpose; that the note is not negotiable on its face; and that the plaintiff knew there was a suit brought against the defendant for the land.

It is true, that the note states on its face that the consideration of it was the purchase of a tract of land from G. & F. Chrétien, who endorsed it to the plaintiff, *without recourse*. It is negotiable, being made payable to the order of the payee. There is no evidence of the knowledge of the plaintiff, when he received the note, that a suit was brought against the maker for the land. The consideration of a note being stated on its face to be the purchase of a tract of land, imposes no obligation on the endorsee to inquire whether his endorser had a good title to the land; neither does this obligation result from the note being endorsed without recourse. The note being in the hands of an endorsee, the maker is disabled from urging an inquiry as to its consideration.

Judgment affirmed.

Maurin v. Chambers and another.—&c.

ANTOINE MAURIN v. JOSIAS CHAMBERS and another.

APPEAL from the District Court of Rapides, *King, J.*
Brent, for the plaintiff.

Dunbar and *Hyams*, for the appellants.

MARTIN, J. The defendants are appellants from a judgment against them, as maker and endorser of their respective promissory notes.

The case is perfectly similar to that of the same plaintiff against Chambers, just decided, *supra* p. 62. The present defendants made a joint purchase from G. & F. Chrétien, of a tract of land, and each of them gave his note endorsed by the other, which notes were endorsed by the Chrétiens to the plaintiff, *without recourse*. They made the same defence as Chambers did in the preceding case, and the same evidence was given. Our judgment, therefore, must be the same.

Judgment affirmed.

THE STATE v. SAMUEL Y. BUGG and others.

A District Attorney, prosecuting on behalf of the State, may enter a *nolle prosequi* at his discretion, subject only to the right of the defendant, after trial commenced and evidence given, to insist on a trial. The court has no right to control the attorney of the State, in this respect.

The sureties in a bond to the State for the good behavior of a party and his appearance at court, may avail themselves of all the pleas which their principal could urge. A *nolle prosequi* entered as to their principal, will discharge them.

APPEAL from the District Court of Madison, *Willson, J.*
Bonham, District Attorney, for the State.

Dunlap and *Stacy*, for the appellants. The District Attorney could not be controlled as to entering a *nolle prosequi*. 1 Moreau's Dig. 295, 375, 369. 2 Mass. Rep. 414. The *nolle prosequi* released the sureties. B. & C.'s Dig. 26, 27. Acts of 1813 and 1830. *State v. Dunbar et al.*, 10 La. 101. *State v. Pendergast*,

11 La. 69. *Commonwealth v. Wheeler et al.*, 2 Mass. 172. -7 Pickering, 173. 1 Chitty's Crim. Law, 480, 846-7.

MARTIN, J. The defendants are appellants from a judgment against them, as principal and sureties, in a bond to the Governor of the State, for the good behavior and appearance at court of the principal. The District Attorney entered a *nolle prosequi* against the principal, notwithstanding which, judgment was given against the defendants, the court being of opinion, that it had power to control the prosecuting officer of the State in this respect. In our opinion it erred.

The State, like all other plaintiffs, has the undoubted right to dismiss all suits brought by it; and this is in the discretion of the attorney who prosecutes for it, and who is in possession of all the facts which render the dismissal of the suit advantageous to the State. We do not wish to be understood to say, that if, during the trial of a defendant, and after evidence given, the prosecuting attorney, to prevent a verdict against the State, offers to enter a *nolle prosequi*, the defendant could not resist the application, and insist on a verdict. The sureties, having a right to avail themselves of all the pleas which their principal may urge, were entitled to the benefit of the *nolle prosequi*, filed by the prosecuting attorney.

It is, therefore, ordered, that the judgment be annulled and reversed, and that there be judgment for the defendants.

PHANOR PRUDHOMME v. ALFRED K. EDENS, Administrator of
the Succession of Melanie Louis Perot.

The true meaning of the first section of the act of 23d March, 1843, chap. 64, is, that if, at the same term at which a judgment has been rendered, an appeal be moved for in open court, no citation of appeal, or other notice to the appellee shall be necessary, he being considered to be in court during the term, and bound to take notice of what passes; but where an appeal is applied for after the term, the usual citation must be served on the appellee.

Where an appeal is applied for after the term of the court at which judgment was rendered, it should be by petition, as required by art. 573 of the Code of Practice,

Prudhomme v. Edens, Administrator.

and not by motion. But where an appeal has been allowed, under such circumstances, on motion, and citation has been duly served, and the other requisites complied with, it will not be dismissed for such irregularity.

The husband being the head and master of the community, all contracts entered into during the marriage, must be considered as made by him, and for his advantage, whether made in his own name, or in the names of both husband and wife. C. C. 2371, 2372, 2373. This presumption can only be destroyed by positive proof that the consideration of the contract enured to the separate advantage of the wife. The acknowledgment made by the wife in the instrument itself, cannot avail the creditor.

APPEAL from the Probate Court of Natchitoches, *Greneaux, J. Sherburne and J. B. Smith*, for the plaintiff. The acknowledgment in the note relieved the plaintiff from the burthen of proving that the wife was benefitted by the contract. *Rawle v. Skipwith and wife*, 8 Mart. N. S. 414, 421.

Rothrock, for the appellant. The obligation was not binding on the deceased, having been contracted under circumstances prohibited by law. Civil Code, art. 2412. *Durnford v. Gross and wife*, 7 Mart. N. S. 465. *Banks v. Trudeau*, 2 Ib. N. S. 39. *Brandegge v. Kerr and wife*, 7 Ib. N. S. 64. *Gasquet et al. v. Dimitry*, 9 La. 585. *Davidson v. Stuart et al.*, 10 La. 146. The case of *Rawle v. Skipwith and wife*, cited by the plaintiff's counsel, is different from the one before the court. The *onus probandi* that the debt enured to the benefit of the wife, was on the plaintiff. 3 La. 74.

MORPHY, J. The plaintiff seeks to recover a judgment against the succession of the late Melanie Louis Perot, on a note drawn by her, *in solido*, with her husband, Louis S. Perot, to the order of the plaintiff, in which note she acknowledged that the consideration for which it was given enured to her own separate and individual advantage and benefit. The defence set up by the administrator was, that the estate was not liable for this note, and he denied, that the sum for which it was given was applied to the use, or was at all beneficial to the deceased; averring that her husband was alone benefitted by the contract. There was a judgment below against the estate, from which the administrator took this appeal, which is a devolutive one.

The appellee moves for its dismissal on two grounds, to wit :

1st. That the application for the appeal and the order of court
VOL. VI.

granting it, were not in accordance with the law of the 22d of March, 1843, relative to appeals and notices of judgments, the same having been made several terms after that at which the judgment was rendered.

2d. That the record exhibits three distinct and separate judgments, to wit : one on the note sued on, one on a rule to set aside a suspensive appeal taken from said judgment, and one ordering the administrator to file a brief statement of the condition of M. L. Perot's succession : and that it does not appear from which of these three judgments the appeal has been taken.

I. The law of 1843, referred to provides, that " the party intending to appeal may do so either by petition, or by motion in open court, at the same term at which the judgment was rendered, in which last case, the Judge shall fix the amount of security and cause the same, with the order granting the appeal, to be entered upon the minutes of the court : and when an appeal has been granted on motion in open court, no citation of appeal, or other notice to the appellee shall be necessary." The true meaning and purport of this law we believe to be, that if, at the same term of the court at which a judgment is rendered, an appeal is prayed for, by motion in open court, no citation of appeal, or other notice to the appellee shall be necessary, because he is considered to be in court during the term, and is bound to take notice of what passes in it ; but, that after the term, the usual citation must be served upon him. In the present case, the Judge might have perhaps refused to grant an appeal on motion, at a subsequent term of the court, and might have required the filing of a petition as provided by art. 573 of the Code of Practice ; but the appeal having been granted on an application made in that form, and a citation having been served on the appellee, and the other material requisites having been complied with, we do not think the form of the application a sufficient ground to dismiss the appeal allowed in this case. A motion in open court, is an oral petition to the court, which becomes a written one, when spread upon the minutes ; and the appellee has had all the advantages he would have been entitled to, had an ordinary petition of appeal been filed.

II. On the second point, we think it sufficiently appears from

the record, that the appeal was taken from the main judgment in the suit, to wit, that on the note sued upon. Having failed to obtain a suspensive appeal, the defendant took a devolutive one, which enabled the plaintiff to obtain, as he did, a decree ordering the defendant to file a brief statement of his condition as administrator of the estate of Melanie L. Perot.

On the merits, we think that article 2412 of the Civil Code is decisive of this case. It is said, however, that before a wife can avoid an obligation contracted for, or conjointly with her husband, it must be made to appear that the debt *was contracted* by him, and that the *onus probandi* rests on her, that in point of fact, she signed only as surety of her husband. The reverse of this proposition, we believe, to be the law. The husband, being the head and master of the community, all contracts entered into during the marriage must be considered as made by him, and for his advantage, whether they be made in his own name, or in the names of both the husband and the wife. Civil Code, arts. 2371, 2372, 2373. This presumption can be destroyed only by positive proof, that the consideration of the contract enured to the separate benefit and advantage of the wife. In this case, no evidence whatever has been offered to establish this fact, although the pleadings expressly put the plaintiff upon the proof thereof. It is clear, that the acknowledgment made by the wife in the instrument itself, cannot avail the plaintiff; if it could, the protection which the law gives to married women would be nugatory; as good care would be taken, to make them subscribe to declarations of this kind in every contract they may join in under the influence of marital power.

It is, therefore, ordered, that the judgment of the Court of Probates of the Parish of Natchitoches be reversed, and that ours be for the defendant, with costs in both courts.

BERRY A. WILSON v. JOHN MURRELL.

Before a creditor of a succession can proceed against the surety of a curator, executor, &c., he must, under the sixth section of the act of 16 March, 1842, chap. 120, have pursued the steps pointed out by arts. 1055, 1056, and 1057, of the Code of Practice, and have exhausted all the means which the law gives him to obtain payment from the principal, officially and personally.

APPEAL from the Court of Probates of Claiborne, *Peets, J.*
Sherburne and J. B. Smith, for the plaintiff.
Tuomey, for the appellant.

SIMON, J. The object of this suit is to make the defendant liable, as surety on the bond of Mary Vincent, curatrix of the vacant succession of Josiah Vincent deceased, to pay the amount of a judgment which the plaintiff obtained against said curatrix. An execution issued on the judgment was returned, "no property found."

There was judgment below in favor of the plaintiff, and the defendant has appealed.

The record shows, that the curatrix, having filed an account of her administration of the succession, that is to say, of the manner in which she had disposed of the funds of the estate, said account was opposed by the plaintiff, who is one of the creditors of the deceased, and who prayed in his opposition, that a certain part of the account should be disregarded, and not homologated; whereupon, a judgment was rendered sustaining the opposition, ordering that the opponent be placed on the tableau for the amount by him claimed, and that the curatrix pay him that amount, with the costs of the proceeding. This judgment is dated the 12th March, 1842. On the 6th of December following, the plaintiff issued an execution against the curatrix in her official capacity, which was returned by the Sheriff, "no property found," whereupon he instituted the present suit, under the 6th section of an act of the Legislature, approved 16th of March, 1842. See page 302, of the laws of that session.

The law under which this suit was brought declares: "that the Courts of Probates shall have exclusive cognizance of all suits against sureties on the bonds which they are bound to receive from curators, &c., generally; and no such suit shall be in-

Wilson v. Murrell.

stituted against the security, until the necessary steps shall have been taken to enforce payment against the principal."

Now, under arts. 1055, 1056, 1057, of the Code of Practice, if the curator has no funds in his hands, he shall inform the Sheriff, when the judgment is notified to him, that he has not sufficient funds to satisfy it. This appears to have been done in this case; since, from the return of the execution, which may be taken here as tantamount to a notification of the judgment, nothing was found to satisfy it. But thereupon, it was the duty of the creditor to make a motion to the court for the purpose mentioned in art. 1056, in order to ascertain the curatrix's condition with regard to the succession; and under art. 1057, she would have been entitled to show, that she had no funds in her hands, or in case of her refusing or neglecting to comply with the requisites of the law, an execution should have been taken out *against her personally*. These last requisites of the law do not appear to have been fulfilled by the appellee. They were necessary to enforce payment against the curatrix, and being comprised among the steps which the law says must be taken against the principal, we are constrained to require, that before being allowed to proceed against the surety, the plaintiff should bring himself within the meaning and requisites, of the law of 1842. The expressions of that law, that "no such suit shall be instituted against the surety, until the necessary steps shall have been taken to enforce payment against the principal," clearly indicate, that the plaintiff could not institute this action, until after having exhausted all the means which the law gives him to get the money due him from the curatrix. The law is positive, and it is our duty to obey the will of the law maker, whatever change it may operate in the course of our jurisprudence.

This suit was, therefore, prematurely instituted, and it must be dismissed.

It is, therefore, ordered, that the judgment of the Probate Court be annulled, and reversed; and that ours be for the defendant, as in case of nonsuit, with costs in both courts.

Rudy v. Harding and another.

SAMUEL RUDY v. JOHN D. HARDING and another.

After the dissolution of a partnership no one of the partners can use the social name so as to bind the others. Any authority to do so must be derived from a new contract between the parties, and such a contract is essentially one of mandate. To draw or endorse any bill, or note, in the name of the former partnership, the authority must be express and special. C. C. art. 2966.

A partner in an ordinary partnership, may, during its existence, bind his co-partner, if it be shown that the transaction benefitted the partnership. C. C. art. 2845.

APPEAL from the District Court of Carroll, *Curry, J.*

Browder, for the plaintiff.

Willson, for the appellant.

SIMON, J. This action is instituted to recover the balance due on a promissory note, executed at Louisville, in Kentucky, on the 2d of July, 1840, payable six months after date, and subscribed, "Harding & Owen." The note is drawn jointly and severally, for the sum of \$1254 90, and is credited on the back by \$660 88.

The defendants severed in their defence. Owen pleaded the general issue; and Harding, after denying that he ever was in partnership with his co-defendant, denied specially his signature to the note sued on, alleging that his name to the said note is a forgery, &c. His answer concludes by claiming in reconvention, the sum of one hundred dollars damages, for counsel fees in defending the suit, &c.

Judgment was rendered below in favor of the defendant Owen, against the plaintiff;* and in favor of the latter against Harding, for the sum of \$594. From this judgment, Harding has appealed.

The evidence shows, that the instrument sued on purports to be an obligation signed by the partners of a particular partnership, the name whereof was signed by the defendant Owen; that this note is the last of a series of notes given in renewal of an original one, signed jointly by both partners, and given for the

* The judgment in favor of Owen was on the ground, that the defendants were liable jointly only, and that Owen had paid his proportion.

price of a negro man, purchased by the defendants in Kentucky, for the sum of \$800. It appears that the slave was bought for the use of a plantation, then owned in partnership by the defendants, and the note sued on is the last renewal of the original one, and was signed in the handwriting of Owen, *alone*, long after the dissolution of the partnership. The purchase of the slave was made on the 2d of October, 1835, and the dissolution of the partnership took place in November, 1836. In the mean time, several renewals of the original note had been made by Owen alone, in the name of the firm, to wit: one on the 2d of October, 1836, by a note of \$869 20; another on the 2d of January, 1837, by a note for \$956 12; and the last on the 2d of July, 1840, by the note sued on. The payment credited on the back of said note, was made by Owen.

The question submitted to our solution, is, in our opinion, a very simple one. It is, whether Owen had sufficient authority from his former partner, to renew the original note of the partnership after its dissolution, and to use Harding's name, or the name of the firm, so as to bind his co-defendant.

It is first to be remarked, that the original obligation, signed by the two partners, was a joint one; that the note sued on is drawn *in solido*; and is for a much larger amount than the one in renewal of which it is shown to have been given. The obligation under consideration cannot, therefore, be said to be the same, or of the same nature as the original one; and in supposing that one partner could, after the dissolution of a particular partnership, settle or transact the unfinished business of the old firm, in the name of all the partners, it is clear, that he cannot bind them in any other manner, than in that in which they were originally bound; unless he obtains from them a special authority to do so.

But our jurisprudence is well established that, after the dissolution of a partnership, no one of the partners is at liberty to use the social name so as to bind the others. 4 La. 32. 6 La. 683. 13 La. 197. 15 La. 496. 16 La. 69. 18 La. 333. In the case of *Peters & Millard v. Gardère*, 8 La. 568, this court said, that the authority must be derived, not from the former relations of the parties as partners, but from a new contract or agreement between them, and such contract is essentially that of mandate.

Here, it is true, it was shown that Harding requested his former partner, to make some arrangement of their unsettled partnership affairs in Kentucky; but there is no proof that he gave to Owen any authority to renew the note, and to use the name of the firm; and our law says in positive terms, that "to draw or endorse bills of exchange, or promissory notes," the power must be express and special. Civil Code, art. 2966.

It has been urged, however, and this was the basis of the judgment appealed from, that the authority of a partner, in an ordinary partnership, is sufficient to bind his co-partner, if it is shown that the transaction benefitted the partnership, and we have been referred to the Civil Code, art. 2845, and 13 La. 197. This is undoubtedly correct, if the engagement is contracted during the existence of the partnership; and in this case, Harding would perhaps have been bound to pay the one-half of the price of the slave purchased in Kentucky, on the original note of \$800, if the contract had been made by Owen alone, on showing that the partnership was benefitted by the transaction; but this rule cannot extend to contracts made after the dissolution of the partnership. Neither partner has the right of binding the other, upon an engagement contracted after the partnership is at an end; and to say, that Owen could validly contract the obligation sued on, in the name of the firm, after it had ceased to exist, and bind his former partner, *in solido*, with himself, and for a larger amount than that originally due, on showing that the first contract was for the benefit of the partnership, would be, in our opinion, a direct violation of the rule so often and repeatedly recognized. Again, it is necessary that the authority to do so, should be derived from a new contract between the partners, independent and distinct from the one formerly existing between them, under which the original transaction was made. If Owen is bound to pay the whole amount of the note sued on, he may, perhaps, have his recourse against his former partner, to be by him indemnified for the payment of his portion of the partnership debt, as it was originally contracted; but it is clear, the plaintiff has no right of action against Harding upon the renewed obligation, contracted by Owen without any special authority from his former partner.

We think the District Judge erred, in considering the note sued

Mead v. Carnal and another.

on as a continuation of a partnership transaction; and our judgment must be in favor of Harding.

It is, therefore, ordered that the judgment of the District Court be annulled, and that ours be in favor of the defendant Harding, against the plaintiff, with costs in both courts.

JOSHUA R. MEAD v. ALEXANDER H. CARNAL and another.

Where there are several post offices through which an endorser receives his letters and papers indifferently, notice of protest must be sent to the one nearest his residence; but when he habitually receives his letters and papers through the more distant one, notice through it will be valid.

APPEAL from the District Court of Rapides, King, J.

Leckie, for the plaintiff.

Evans, for the appellant.

SIMON, J. This suit was brought against the maker and endorser of a promissory note. Judgment was rendered below against the two defendants, *in solido*, and one of them, Bryce, the endorser, took the present appeal.

The only defence set up by the appellant is, that the plaintiff has failed to prove that due and legal notice of protest was given to the endorser.

The notice was forwarded to the endorser by placing in the post office at New Orleans, a letter containing it, directed to J. G. Bryce, Alexandria, La.; and the evidence shows, that at the date of the protest, (January, 1841,) the endorser's permanent residence was in the Pine Woods, about eight miles from the Cotile post office. His residence at that time was about twenty miles from Alexandria, and there was then a post office at Cotile.

It is further shown, however, that Bryce was formerly in the habit of receiving *all his letters and papers* at Alexandria, and that all communications to him came addressed to his name. A witness, (Mr. Brewer,) states that Bryce, Barry, and himself, (all lawyers,) in January, 1841, and for more than two years previous

Ex parte Murray.

thereto, as well as for some time after, *had a box in the post office at Alexandria.*

It results, therefore, from the evidence, that at the time notice was sent to the appellant, Cotile was the nearest post office to his residence, but that he was in the habit of receiving all his letters and papers at the post office at Alexandria, where he had a box.

The District Judge, in our opinion, did not err. In matters of notices of protest to endorsers, we have uniformly and repeatedly established the distinction, that when it is shown there are several post offices in the parish, through which the endorser receives his letters and papers indifferently, the notice must be sent to the nearest. *Foreman v. Wikoff*, 16 La. 20. *Mechanics and Traders Bank v. Compton et al.*, 3 Robinson, 4. *Nicholson v. Mar- ders*, 3 Robinson, 342. Whilst we have held in other cases, that when it is shown that the endorser habitually receives his letters and papers through the more distant post office, a notice given through it is valid. *Bank of Louisiana v. Watson*, 15 La. 41. *Union Bank of Louisiana v. Brown*, 1 Robinson, 107. Here, the appellant is shown not only to be in the habit of receiving his letters through the Alexandria post office, but also to keep a box there. This last circumstance strengthens very much the idea that the appellant does not receive his letters through any other post office, as it may perhaps amount to an indirect or tacit instruction given to the postmaster at Alexandria, to retain said appellant's letters and papers, and keep them in the box until sent for.

Judgment affirmed.

EX PARTE EDWIN MURRAY.

Where on an application for a monition under the act of 10 March, 1834, by a purchaser at a Sheriff's sale, for the purpose of confirming his title to the property purchased, it is alleged by the party opposing the homologation of the sale, that the previous advertisements required by law were not made, the *onus probandi* is on the petitioner. They are essential to the validity of the sale, and must be proved when denied.

Faures, Assignee, v. Metoyer.

APPEAL from the Court of Probates of Caddo, *Jenkins, J.*

MARTIN, J. Edwin Murray filed a petition for a monition to perfect a sale made by the Court of Probates. Hannah B. Sewall, and Charlotte Eastman, heirs of John O. Sewall, are appellants from a judgment in his favor. They oppose his pretensions on several grounds. It is useless to examine any but the seventh, which is, that the sale took place before the expiration of the usual delays, *without the legal advertisements being made*, and not according to the terms stated in the order. The opponent having denied that the legal advertisements had been made, the *onus probandi* devolved on the petitioner, who had the means of proving that the legal advertisements had been made, if they were really so, while it was impossible for the opponents to prove that they were not. Preceding advertisements being of the essence of a forced or judicial sale, the courts cannot recognize any validity in such a sale, when it is alleged, that it took place without the legal advertisements, and the opposite party does not produce evidence of them.

It is, therefore, ordered, that the judgment be annulled, the opposition sustained, and the sale set aside; the petitioner paying the costs in both courts.

Tuomey and Crain, for the petitioner.

Gilbert and P. A. Morse, for the appellants.

JOHN E. FAURES, Assignee of the estate of Antoine Jonau, a Bankrupt, v. AUGUSTE METOYER.

A copy of a decree of a District Court of the United States sitting in Bankruptcy, certified under the signature of the Clerk, appointing an assignee to the estate of a bankrupt, and ordering him to give security in a certain sum for the faithful discharge of his duties, is sufficient evidence of the authority of the person so appointed to sue as assignee, where the exception does not state the grounds on which plaintiff's capacity is denied. It will not be presumed that the certificate was delivered, before the person so appointed had complied with the orders of the court.

APPEAL from the District Court of Natchitoches, *Boyce, J.*

Faures, Assignee, v. Metoyer.

MORPHY, J. This suit is brought by the plaintiff as assignee of the bankrupt Antoine Jonau, liquidating partner of the late mercantile firm of Jonau, Metoyer & Co., composed of Jonau, Auguste Metoyer, and Emilien Larrieu. The object of it is, to recover of Auguste Metoyer, one of the late partners, the amount of certain notes which, after the dissolution of the partnership, and in settlement of a debt he owed to it, he subscribed to the order of the firm. The defendant excepted to the capacity in which the plaintiff instituted this suit, and denied his right to sue. This exception having been sustained, and the suit dismissed, the plaintiff has appealed.

The plaintiff's capacity and right to sue are, in our opinion, sufficiently shown by a certified copy, which we find in the record, of a decree of the United States District Court for the Eastern District of Louisiana sitting in Bankruptcy, which appoints him assignee of the said bankrupt. The same decree orders, that the said J. E. Faures shall give security in a bond to the United States, with two sufficient sureties to be approved of by the Court, in the sum of \$25,000, conditioned for the due and faithful discharge of all his duties as such assignee, &c.* This appointment is

* The copy was in the following words :

"UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF LOUISIANA. Sitting in Bankruptcy, April 9th, 1842. Present, the Hon. T. H. McCaleb, Judge.

In the matter of the petition of ANTOINE } No 78.
JONAU, to be declared a bankrupt. }

The petition and proofs having been inspected and considered by the court, and being found in conformity with the requirements of the act of Congress, it is, therefore, ordered, that ANTOINE JONAU of New Orleans, be, and he is hereby declared and decreed bankrupt, pursuant to the act of Congress entitled, "an act to establish a Uniform System of Bankruptcy throughout the United States," passed August 19, 1841. It is further ordered, that JOHN E. FAURES of New Orleans, be, and he is accordingly hereby appointed assignee of the estate of the said bankrupt, and that the said John E. Faures give security in a bond to the United States, with two sufficient sureties, to be approved of by the court, in the sum of twenty-five thousand dollars, conditioned for the due and faithful discharge of all his duties as such assignee, and his compliance with the orders and directions of the court. And it is further ordered, that the clerk do certify and cause to be delivered this order to the said assignee.

Clerk's office, April 19th, 1842. I, N. R. Jennings, Clerk of the United States District Court for the Eastern District of Louisiana, do certify that the above orders and

Cuny v. Dudley.

an absolute one. We are not to presume that the clerk delivered this certificate to the plaintiff before he had complied with the orders of the court. At all events, we think that the plaintiff has made a sufficient showing, on an exception so vague as that taken by the defendant, which does not state the grounds on which the plaintiff's capacity and right to sue are denied.

It is, therefore, ordered, that the judgment of the District Court be reversed, that the exception be overruled, and that the case be remanded to be proceeded in according to law; the defendant and appellee paying the costs of this appeal.

Dunbar, Hyams, and Elgee, for the appellant.

P. A. Morse, and Roysdon, for the defendant.

JUDITH ANN LEONARD CUNY v. CLARISSA DUDLEY.

Payment of the costs of the lower court by a defendant who has taken a devolutive appeal, is not such an execution of the judgment, as will take away the right of appeal. Payment of the costs might have been compelled by execution, the appeal not being suspensive.

A married woman, not separated from bed and board, cannot sue or be sued, without the authorization of her husband, or that of the Judge before whom the suit is brought. Nor can she appeal from a judgment rendered against her, without having been so authorized.

APPEAL from the District Court of Rapides, *King, J.*

Flint and Thomas, for the plaintiff.

Harris, for the appellant.

MARTIN, J. The dismissal of this appeal is asked on the affidavit of the counsel for the plaintiff and appellee, who attests, that the appellant has executed the judgment appealed from; that she is a married woman, and was so at the time she obtained the ap-

decrees were this day made by the court, and duly entered in the Docket of Bankrupt Proceedings.

To JOHN E. FAURES,

Assignee.

N. R. JENNINGS,
Clerk of the United States District Court,
Eastern District of Louisiana.

peal, and was not assisted by her husband, or authorized by the Judge in obtaining said appeal, and is not bound by the bond which she executed without his authority.

It is true, that she paid the costs in the court below; but her appeal is devolutive only, and the clerk might have compelled her, by an execution, to pay the costs.

It is not denied, that she is a married woman; and as such, she cannot stand in judgment, or institute a suit without the authorization of her husband, or that of the Judge. It has been urged on her behalf, that the suit which terminated in the judgment appealed from, was brought against her while she was married, and that her husband was not made a party thereto. If that be the case, she may be relieved by an appeal, or action of nullity; but the appeal, and the action of nullity, are both suits which she cannot institute without authorization.

Appeal dismissed.

JOSEPH T. ROBINSON v. ALEXANDER BUTLER and another.

The omission of a plaintiff in an action against a married woman, to cause her to be authorized, either by her husband or the court, to defend the suit, rendering the proceedings absolutely null, will be noticed by the court, though it escape the attention of the parties. In such a case the judgment may be reversed, and the case remanded to enable the plaintiff to have the opposite party legally authorized to defend the action.

APPEAL from the District Court of Claiborne, King, J.

Lawson and Tuomey, for the appellant.

J. Taylor. for the defendants.

MARTIN, J. The plaintiff is appellant from a judgment of non suit, in an action for the rescission of a sale made by one of the defendants to the other, the vendor being insolvent, and the sale having no other object than to give to the vendee an unjust preference over her co-creditors, for a very small sum, for which he has a claim against the vendor, who is her son.

There is an error apparent on the face of the record, which,

Vancampen v. Morris, Tutor, and another.

although our attention has not been drawn thereto by either of the parties, it is our duty to notice. One of the defendants being a married woman, it became necessary for the plaintiff in order to sustain his suit, to have had her authorized to defend it, either by her husband, or by the court. The husband being an absentee, both means were resorted to. The first was attempted in the petition, by a clause praying, that a curator might be appointed to him, and that he might be cited to come and assist his wife. The other was attempted by a motion in court, that the court might authorize the wife to defend the suit alone. We find no evidence of the appointment of such a curator. The plaintiff's motion to have the wife *authorized by the court* to defend the suit, is indeed spread on the record; but the court intimated a desire to have some time to consider it, and the record does not show, that the plaintiff ever provoked a decision on his motion.

This error forms an absolute nullity, and one of those which relate to the good order of society. Errors of this kind are always noticed by the courts, although they escape the attention of the party against whose rights they militate.

It is, therefore, ordered, that the judgment be reversed, the verdict set aside, and the case remanded for further proceedings, with directions to the Judge to act on the plaintiff's motion for the authorization of the wife by the court; the defendants paying the costs of the appeal.

WILLIAM VANCAMPEN v. LEMUEL B. MORRIS, Tutor, and another.

Where an appeal is taken, the transcript of the record must be filed within three judicial days after the return day, or it will be too late. The rule, that when an act is to be done within a given time, it may be done afterwards if nothing occurs to prevent it, does not apply to such a case.

APPEAL from the Court of Probates of Concordia, *Dunlap, J.*
F. H. Farrar, for the appellant.

Jenkins, Administrator, v. Sheldon.

Stacy, for the defendants.

SIMON, J. The defendants and appellees have moved to dismiss this appeal, on the ground that the appellant neglected to file the transcript on the return day, or even the return term of the same; although it was ready to be filed at that time.

It appears, that the order of appeal was obtained on the 6th of August, 1842; that it was made returnable on the second Monday of October ensuing; that the appeal bond was filed on the 29th of September, 1842; and that the citation of appeal was served on the 20th of October following. The certificate of the clerk is dated 30th of September, 1842, and the transcript was only filed in this court, on the 30th of September, 1843.

This is clearly irregular. We have often said, that the transcript of the record must be filed within three judicial days after the return day, and that the rule, that when an act is to be done within a given time, it may be done afterwards if nothing occurs to prevent it, does not apply to the case of filing a transcript of the record of appeal. 8 La. 206. 7 La. 177. The record in this case should have been filed within the legal delay, during the last term of this court, and it is now too late to have any legal effect.

Appeal dismissed.

BUSHROD JENKINS, Administrator of the Succession of John C. McLeod, v. SETH SHELDON.

APPEAL from the District Court of Caddo, King, J.
Crain, for the plaintiff.

Gilbert, P. A. Morse and Roysdon, for the appellant.

MARTIN, J. The plaintiff states that his intestate, being desirous to obtain money for the purchase of a tract of land from the government of the United States, applied to the defendant, and as the best way to secure the re-payment of the money, proposed to permit him to take the certificates of entry from the Register and Receiver in his, the defendant's, name; that, accordingly, the

Yeatman v. Henderson.

defendant made a joint note with the plaintiff's intestate, on the faith of which the latter realized the money ; that on this the defendant entered into a written obligation, to transfer all his right to the land thus purchased to the intestate, on the payment of the amount of said note ; that the note has long ago been paid by the intestate ; and that the defendant refuses to permit the land to fall into the estate of the intestate, and fraudulently seeks to avail himself of the apparent title, of which he is in possession.

The defendant relies on a plea of the general issue. There was a verdict and judgment against him, and he has appealed.

The plaintiff's evidence consists of the obligation of the defendant to convey the land, and of the production of the joint note of his intestate and the defendant, from among the papers of the estate. The defendant has not pretended that he has paid any part of the note. His counsel has, indeed, urged that the purchase was a joint one, between the intestate and him ; but this is negatived by the written obligation, and by the testimony of the man who discounted the note on the defendant's credit.

Judgment affirmed.

THOMAS H. YEATMAN v. WILLIAM HENDERSON.

Where a defendant, after having obtained several continuances, moves for leave to file an amended answer propounding interrogatories to the plaintiff, a resident of another State, evidently merely for delay, permission will be refused.

APPEAL from the District Court of Carroll, *Willson, J.*
Selby, for the plaintiff.

Bemiss and Stockton, for the appellant.

MARTIN, J. The plaintiff seeks to recover from the defendant the amount of six promissory notes, three of which were made by him, and the other three by the firm of John Henderson & Co., of which he is a member. The defendant admitted his signature, to the first three notes, but denied that the other three were signed by him, without admitting or denying his partnership with John

Henderson & Co., or that they were signed by the latter. He urged the absence, or failure of the consideration of the three first notes. He pleaded that the other three were also given without consideration; and the payee gave a receipt against said notes.

There was a verdict and judgment for the plaintiff, and the defendant has appealed.

Our attention is drawn to a bill of exceptions to the opinion of the court, refusing to the defendant leave to file an amended answer propounding interrogatories to the plaintiff. The court refused leave, on the ground that the application appeared tardy, and was evidently made to delay the trial of the suit, which was instituted in August, 1840, the defendant having obtained several continuances. This application was made in November, 1842, and the plaintiff residing in the State of Ohio, the suit must have been continued to give him time to answer. It does not appear to us that the court erred.

The record shows, that the claim of the plaintiff was fully proved, and the consideration of the notes established; and the defendant failed in showing any thing which he had alleged in his defence.

Judgment affirmed.

PHOEBE CARTER v. JAMES MONETTI.

A patent from the United States for a part of their public lands is conclusive, unless attacked for error or fraud.

APPEAL from the District Court of Madison, *Curry, J.*

Copley, for the appellant.

Stockton, for the defendant.

BULLARD, J. The plaintiff alleges, that she is the legal owner of fractional section No. 1, in township 16, of range No. 12 east, on the Roundaway bayou, in the parish of Madison. That she acquired title thereto by pre-emption and entry at the Land Office at Monroe, Louisiana, but that in the duplicate receipt in her favor, the officers at the Land Office inserted by mistake that it was in range *thirteen*, instead of *twelve*. She represents, that one

Carter v. Monetti.

James Monetti has possession of a part, and claims to be owner of the whole. She asks for judgment, and to be decreed to be the just and true proprietor, and for two thousand dollars damages.

James Monetti, the original defendant, disclaims title in himself, but alleges, that he holds possession for John W. Monetti, who, he asserts, is the real owner of the lot of land claimed by the plaintiff.

John W. Monetti thereupon makes himself a party, denies the title of the plaintiff, and avers, that he is the only just and true proprietor of the lot in controversy.

After a trial upon the merits, there was a judgment for the defendant, adjudging the land to belong to him, and the plaintiff appealed.

The defendant gave in evidence, as proof of his title, two patents from the United States, the one dated the 28th of July, 1840, in his favor, for the *east* half of lot No. 1, in township 16, of range 12 east, containing seventy acres and forty-two and a half hundredths, and the other dated January 12, 1841, for the *west* half of the same lot, containing the same quantity.

These patents cover the *locus in quo*, and are conclusive, in our opinion, upon the question of title between the parties. In the case of *Lott and others v. Prudhomme and another*, decided at the last term at this place, (3 Robinson, 293,) we held, that in an action at law, the patent from the United States for a part of their public lands is conclusive, unless attacked for error or fraud. 13 Peters, 493.

The plaintiff, however, contends, that the patents were issued in fraud of her rights as a pre-emptioner. Even admitting, that this is the proper form, as well as *forum*, in which the plaintiff might seek to avoid the patents issued to the defendants, it does not appear to us, that she has shown such evidence of right as entitles her to complain. Her claim was, at best, but inchoate—never finally recognized by those officers, who alone were competent to decide upon pre-emption claims; and until her claim has been acted upon and confirmed, she cannot successfully oppose it to a patent issued for the land in controversy.

Judgment affirmed.

JOHN J. GUION and another v. ROBERT FORD.

In an action by the plaintiffs, as assignees of a prison-bonds bond, against the surety, parol evidence is admissible to prove a variance between the names of the assignees on the bond and those of the plaintiffs, to be but a clerical error.

APPEAL from the District Court of Madison, *Willson*, J.
Stockton, and *Steele*, for the appellants.

F. H. Farrar, and *Bemiss*, for the defendant.

MARTIN, J. This is an action upon a prison-bonds bond. The defendant pleaded the general issue. The plaintiffs introduced the bond given to the Sheriff of the Parish of Carroll, who had arrested Rusk, the principal therein, on a *ca. sa.*, issued on a judgment obtained by Guion & Prentiss, on the back of which is an assignment to "John J. Guion and Samuel S. Prentiss," (Guion & Prentiss.) It is admitted that Rusk was killed out of the Parish of Carroll. There was a verdict and judgment in favor of the defendant and the plaintiffs have appealed.

Our attention has been drawn to several bills of exceptions. The first, is to the opinion of the court rejecting the evidence of Stockton, who, deposed that he brought the original suit against Rusk, on which the *ca. sa.* was issued; that the plaintiffs in that suit, were really the same persons as those in the present; that, in the original suit, the christian name of Prentiss was, by mistake, stated in the petition, to be Samuel S. instead of Sargeant S. The second bill, is to the rejection of the assignment of the prison-bonds bond to the plaintiffs, on the ground of the same misnomer. The last bill relates to the Judge's charge, which stated that, in order to be enabled to find for the plaintiff, the jury must be convinced that, in the original suit, judgment had been rendered in favor of Sargeant S. Prentiss and John J. Guion, by those names and designations; that, an execution, or *ca. sa.*, had issued on said judgment; that, on that execution, the defendant, Rusk, had been taken in execution; and that, the said Rusk and Ford gave the bond sued on. The plaintiffs' counsel, requested the court to withdraw that charge, and to charge the jury, that if they believed the plaintiffs in the original suit and the present to be the same persons, and that the other material allegations of the

plaintiffs' petition have been proved, they must find for them. This, the court refused.

The counsel for the appellants contends, that the assignment was made to Samuel S. Prentiss and John J. Guion; that this was a clerical error, as appears from the original suit against Rusk, which was brought under the names of Samuel S. Prentiss and John J. Guion, who were in partnership, under the firm of Guion & Prentiss; that Rusk did not avail himself of this error; that the judgment on which he was arrested, was against him, and that the prison-bonds bond was given in a case in which Guion & Prentiss were plaintiffs. If the assignment had been made to Guion & Prentiss, it would have been perfectly correct. It is true, it is made to Samuel S. Prentiss and John J. Guion, but immediately after these names, the Sheriff takes care to insert between a parenthesis "Guion & Prentiss," which is the firm under which the plaintiffs carried on their affairs. These circumstances, it is urged, authorize parol evidence to show that the word *Samuel* was inserted through error, instead of that of *Sargeant*, there being but two partners in the firm, and neither being named *Samuel*. The surety may avail himself of all the pleas which his principal might resort to. Rusk being arrested on a *ca. sa.*, issued on a judgment obtained by Samuel S. Prentiss and John J. Guion, could not be relieved, because his plea had admitted his liability, or it had been found by a contradictory judgment.

It appears to us that the court erred.

The evidence of Stockton ought to have gone to the jury; but, as the plaintiff contends, that the same error occurs in all the proceedings of the original suit, we have thought it best, notwithstanding the evidence excepted to is incorporated in the bill of exceptions, as the defendant has prayed for a trial by jury, to remand the case; for his counsel, contends that the assignment could not have been made, otherwise than it is. The Sheriff on arresting the defendant took his bond, in which the judgment is stated to have been obtained by Guion & Prentiss. This was perfectly correct, and if the assignment had been made to Guion & Prentiss, it would have been equally so. But the Sheriff thought, that it was his duty to assign the bond to the plaintiffs under the names in which they had instituted the suit, prosecuted it to judg-

ment, and were attempting to execute it. He did not think he had any authority to inquire whether there had been any error in the proceedings before the District Court, or in the execution in his hands. It has not appeared to us necessary to act upon the bill of exceptions to the charge to the jury.

It is, therefore, ordered, that the judgment be annulled, and the case remanded, with directions to the Judge to admit parol evidence of the misnomer, and to admit the assignment to go to the jury; the defendant paying the costs of the appeal.

JOHN MAXWELL v. LEWIS A. COLLIER.

Service of petition and citation, within the enclosures of a plantation on which the defendant resides, on a free person, apparently above the age of fourteen, shown to have resided at the time on the same plantation, but not in the dwelling house with defendant, is sufficient. *Per Curiam*. The whole plantation was the domicile of the defendant, and service on a person living on it, was good. C. P. 189.

A plea of payment will not authorize evidence of an adverse claim in compensation not equally liquidated with plaintiff's demand. C. C. 2205. C. P. 367.

Judgments in this State upon those rendered in other States, must render them executory according to their tenor, whether *via executiva*, or by decreeing their execution in an ordinary action.

APPEAL by the defendant from a judgment of the District Court of Concordia, Willson, J.

Dunlap, for the plaintiff.

Stockton and Steele, for the appellant.

MORPHY, J. The defendant, being sued on two judgments rendered against him in the Circuit Court of Adams county, in Mississippi, amounting together to \$494 37, pleaded payment, after an exception he had taken to the service of the citation had been overruled by the court.

The return of the Sheriff shows, that service of the petition and citation was made "on the defendant, Lewis A. Collier, he being absent, by leaving the same at his domicile, in the hands of Thomas Joy, a free person apparently above the age of fourteen years, being and residing at the domicile of the defendant," &c. This service, we think, was sufficient. The defendant has failed

to show, that Joy, his overseer, resided elsewhere, as alleged in his exception. The evidence shows, that the service was made on the defendant's overseer Joy, within the enclosures of the plantation, where he and defendant reside, in the parish of Concordia, although it does not establish, that the overseer resides in the dwelling house of the defendant. The whole plantation was the domicile of the defendant, and service on a person living on it was good. Code of Practice, art. 189. 19 La. 36.

On the trial, testimony was offered to prove a claim of the defendant's against the plaintiff, for the value of certain improvements put upon premises, leased to him by the plaintiff in Mississippi, under a written contract, by which his expenses in making said improvements were to be allowed to him. This evidence was, in our opinion, properly excluded by the Judge below. The plea of payment did not authorize evidence of an adverse claim in compensation, not equally liquidated with the plaintiff's demand. Civil Code, art. 2205. Code of Practice, art. 367. It further appears from the records of the judgments rendered in Mississippi, that the same claim was set up there, and passed upon. These judgments form *res judicata*, between the parties.

The appellant's counsel has urged, finally, that there is error in the judgment, as it allows eight per cent interest on the amount sued for, from the 19th of June, 1841, until paid; and that there being no evidence in the record, that such is the rate of interest allowed in Mississippi, only five per cent should have been given from the institution of this suit. The judgments sued upon draw eight per cent per annum interest from the date above mentioned. They are evidence of the interest due, as well as of the debt. Besides, a judgment rendered in this State, upon judgments obtained in other States, must, we apprehend, render them executory according to their tenor, whether this be done by issuing executory process upon them, or by decreeing their execution in an ordinary action.

Judgment affirmed.

ment, and were attempting to execute it. He did not think he had any authority to inquire whether there had been any error in the proceedings before the District Court, or in the execution in his hands. It has not appeared to us necessary to act upon the bill of exceptions to the charge to the jury.

It is, therefore, ordered, that the judgment be annulled, and the case remanded, with directions to the Judge to admit parol evidence of the misnomer, and to admit the assignment to go to the jury; the defendant paying the costs of the appeal.

JOHN MAXWELL V. LEWIS A. COLLIER.

Service of petition and citation, within the enclosures of a plantation on which the defendant resides, on a free person, apparently above the age of fourteen, shown to have resided at the time on the same plantation, but not in the dwelling house with defendant, is sufficient. *Per Curiam*. The whole plantation was the domicile of the defendant, and service on a person living on it, was good. C. P. 189.

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Judgments in this State upon those rendered in other States, must render them executory according to their tenor, whether *via executiva*, or by decreeing their execution in an ordinary action.

APPEAL by the defendant from a judgment of the District Court of Concordia, *Willson, J.*

Dunlap, for the plaintiff.

Stockton and Steele, for the appellant.

MORPHY, J. The defendant, being sued on two judgments rendered against him in the Circuit Court of Adams county, in Mississippi, amounting together to \$494 37, pleaded payment, after an exception he had taken to the service of the citation had been overruled by the court.

The return of the Sheriff shows, that service of the petition and citation was made "on the defendant, Lewis A. Collier, he being absent, by leaving the same at his domicile, in the hands of Thomas Joy, a free person apparently above the age of fourteen years, being and residing at the domicile of the defendant," &c. This service, we think, was sufficient. The defendant has failed

to show, that Joy, his overseer, resided elsewhere, as alleged in his exception. The evidence shows, that the service was made on the defendant's overseer Joy, within the enclosures of the plantation, where he and defendant reside, in the parish of Concordia, although it does not establish, that the overseer resides in the dwelling house of the defendant. The whole plantation was the domicile of the defendant, and service on a person living on it was good. Code of Practice, art. 189. 19 La. 36.

On the trial, testimony was offered to prove a claim of the defendant's against the plaintiff, for the value of certain improvements put upon premises, leased to him by the plaintiff in Mississippi, under a written contract, by which his expenses in making said improvements were to be allowed to him. This evidence was, in our opinion, properly excluded by the Judge below. The plea of payment did not authorize evidence of an adverse claim in compensation, not equally liquidated with the plaintiff's demand. Civil Code, art. 2205. Code of Practice, art. 367. It further appears from the records of the judgments rendered in Mississippi, that the same claim was set up there, and passed upon. These judgments form *res judicata*, between the parties.

The appellant's counsel has urged, finally, that there is error in the judgment, as it allows eight per cent interest on the amount sued for, from the 19th of June, 1841, until paid; and that there being no evidence in the record, that such is the rate of interest allowed in Mississippi, only five per cent should have been given from the institution of this suit. The judgments sued upon draw eight per cent per annum interest from the date above mentioned. They are evidence of the interest due, as well as of the debt. Besides, a judgment rendered in this State, upon judgments obtained in other States, must, we apprehend, render them executory according to their tenor, whether this be done by issuing executory process upon them, or by decreeing their execution in an ordinary action.

Judgment affirmed.

PRUDENT RACHAL v. FRANÇOIS M. NORMAND and another.

The sale of a slave must be in writing, but the law requires no particular form. The statement in a promissory note, made by the purchaser, that it was given for the price of the slave, is sufficient.

A purchaser, with knowledge of an existing privilege or mortgage, cannot avail himself of it, not having been registered.

APPEAL from the District Court of Natchitoches, *King, J.*

J. Taylor, for the appellant, cited 8 Mart. N. S. 136, 246. 6 Ib. N. S. 716. Acts of 1813, and 1824. Bullard & Curry's Dig. 596-597.

Sherburne and *J. B. Smith*, contra. A note reciting that it was given for the price of a slave, cannot be considered written evidence of a contract of sale. No contract is complete without the consent of both parties. In reciprocal contracts this assent must be expressed. Civ. Code, art. 1759. Contracts for the sale of slaves, or other real property, must be in writing. Ib. art. 2415. The sale to Normand was incomplete, wanting the signature of the vendor. 3 Mart. N. S. 458. *Daquin v. Coison*, 6 Ib. 679.

MARTIN, J. The facts of this case are these. The plaintiff sold a slave to Normand, for one thousand dollars, one-half of which was paid in cash, and the balance was given in a note, payable in about twelve months. This contract was made in the presence of Lacour, who was called as a witness thereto. Lacour shortly after purchased the slave from Normand, who not long after left the State, being insolvent, and it is not proved where he has taken up his residence. The present suit is brought, on the appointment of a curator to Normand, for the recovery of the amount of the note, and against Lacour, in order to have it decreed that the judgment obtained against Normand, may be satisfied by the sale of the slave sold to him by the plaintiff, and by him to Lacour, in whose possession he is, the plaintiff claiming on him the vendor's privilege. Judgment was obtained against Normand, but Lacour successfully resisted the claim of

Rachel v. Normand and another.

the plaintiff, on the allegation and proof that the plaintiff's sale to Normand had not been registered. The plaintiff has appealed.

The sole question which the case presents for our solution is, whether the plaintiff can exercise his privilege of vendor, when he has neglected to register the sale, on making proof of the knowledge of Lacour, at the time he made the purchase from the plaintiff's vendee, that the latter still owed part of the price of the slave to the plaintiff. The counsel of Lacour has denied that there was any written sale of the slave from the plaintiff to Normand, and he urges, that the parol sale of the slave is null. Our law has prescribed no form for the sale of a slave. It, however, requires it to be written, and forbids any testimonial proof of the sale. In the present case, the sale from the plaintiff to Normand appears in writing, on the face of the note, which is expressly stated to have been given for the balance of the price of the slave. This precludes Normand from denying the existence of a sale, of which he has furnished written evidence under his signature. The plaintiff, by receiving Normand's note, and instituting the present suit on it, has given evidence by a matter of record, of his having made the sale; so that there is nothing in the averment, that the sale did not take place. The knowledge of Lacour, at the time he purchased the slave, that part of the price was not then payable, is established. In the case of *The Planter's Bank of Georgia v. Allard*, 8 Mart. N. S. 136, the only question which this case presents, was determined in favor of the vendor. We there expressed our opinion that a purchaser, with a knowledge of an existing mortgage, cannot avail himself of the want of registry. It is true, that was the case of a *mortgage*, and the one now before us is that of a *privilege*. Both mortgages and privileges have the same effect, to wit; that of enabling the creditor to demand the sale, for the payment of his debt, of property in the possession of another. In the present comparison, we do not necessarily include the privilege of the vendor of other property than lands and slaves.

It is, therefore, ordered, that the judgment, as far as it relates to Normand, be affirmed; and as far as it relates to Lacour, that it be annulled; and it is ordered, that the slave Daniel, in the pos-

The Mechanics and Traders Bank of New Orleans v. Jemison and others.

session of the appellee, be sold to satisfy the judgment obtained against Normand; Lacour paying the costs in both courts.

THE MECHANICS AND TRADERS BANK OF NEW ORLEANS v.
JOHN JEMISON and others.

The rule that notice of protest must be sent to the post office nearest to the residence of the party to whom it is addressed, is not of universal application; for where he is in the habit of receiving his letters at a more distant office, or through a more circuitous route, notice through the latter will be good.

Notice of protest addressed to "A. B. of the parish of [stating the parish of his residence], at the post office at [mentioning the office at which he was in the habit of receiving his letters]," and deposited in that office, it being in the place where the protest was made, is a sufficient compliance with the second section of the act of 13 March, 1827, requiring the notice to be addressed to an endorser at his domicile, or usual place of residence. The addition of the words "at the post office at —," does not affect the sufficiency of the direction.

APPEAL from the District Court of Concordia, *Willson, J.*

F. H. Farrar, for the appellants, cited *Whittemore, &c. v. Leake*, 14 La. 392. *Lanusse v. Massicot et al.*, 3 Mart. 266. 1 Peters, 578. 2 Ib. 543. Bayley on Bills, 179. 16 Johnson, 218. 1 Pickering, 411. Walker's Miss. Rep. 530. 5 Howard's Miss. Rep., case of *Patrick v. Beasley*.

Stacy and Sparrow, for the defendants. A post office is not a proper place of deposit for notices of protest, unless they are to be transmitted thence by mail. 5 Mart. N. S. 137, 158, 359. 6 Ib. N. S. 506. 7 Ib. N. S. 491. 8 La. 170. 16 Ib. 22. 1 Yerger's Rep. 166. 3 Littell, 498. 6 Mass. 317. 10 Mass. 90. Bayley on Bills, 275. Chitty on Bills, 7 Am. ed. 222, and note. 10 Johnson, 490. 11 Ib. 231. 1 Robinson, 572. 1 Carrington & Payne, 181. 1 Peters, 578.

BULLARD, J. The Bank is appellant from a judgment of non-suit, rendered in favor of Dix & Glasscock, who were sued as endorsers of a bill of exchange. Their defence was the want of due notice of protest.

It appears, that the endorsers had their domicile and place of usual residence in the parish of Concordia, in which there was no

The Mechanics and Traders Bank of New Orleans v. Jemison and others.

post office at the time. The notices of protest appear to have been addressed to each of the endorsers, by name, "Parish of Concordia, Natchez Post Office," and were deposited in the post office at Natchez, when the protest was made. It is further shown, that they were in the habit of getting their letters and papers at the Natchez post office, and there is no evidence of their ever having received any at any other office, although there appear to have been post offices a few miles nearer the residences of the endorsers respectively, on the opposite side of the river, in the State of Mississippi.

We are of opinion, that the notices were sufficient. In 2 Peters, 121, the Supreme Court of the United States held, that the rule as to the nearest post office is not of universal application; for if the party is in the habit of receiving his letters at a more distant post office, or through a more circuitous route, and the fact is known to the person sending the notice, notice sent by the latter mode will be good.

In the case of *Duncan v. Sparrow*, at the last term, (3 Robinson, 164,) this court held, that the notice to the endorser would have been good, if it had been addressed to him at his domicile, or usual place of residence, and deposited in the post office at Natchez, where he was in the habit of receiving his letters. This has been done in the present case, and although the notary added the words, "Natchez Post Office," that direction does not, in our opinion, alter the case; because the postmaster already knew that the endorsers were in the habit of receiving their letters at his office, and he was not authorized to forward them to any other.

The subject of notices of protest has engaged our particular attention at this term, in the case of *Mead v. Carnal and another*, ante, p. 73; and we refer further to the authorities cited in the opinion delivered in that case, in support of the opinion now expressed, that the endorsers in the present case are liable.

It is, therefore, ordered, that the judgment of the District Court be reversed, and that the plaintiffs recover of the defendants, William Dix and B. F. Glasscock, *in solido*, the sum of twelve hundred dollars, with interest, at eight per cent per annum, from the 6th of January, 1842, four dollars costs of protest, and the costs in both courts.

GEORGE W. LOVELACE v. WILLIAM R. TAYLOR and others.

The statement of the title of the case, and of the court from which the appeal is taken, written at the head of the opinions prepared by the Judges of the Supreme Court, is not required by law. It forms no part of the judgment, and when erroneous may be disregarded.

The functions of a District Court in relation to a mandate issued from the Supreme Court to have a judgment executed, are merely ministerial. It cannot render any new judgment which can authorize an appeal, or render one necessary. Its duty is to obey the mandate, and to order the decision of the Supreme Court to be recorded on its minutes, that it may be legally executed. C. P. art. 619. As soon as this is done, the party in whose favor the judgment has been rendered, has an absolute, immediate right to an execution, which cannot be suspended by any subsequent appeal. C. P. 623, 629. If the mandate of the Supreme Court be not obeyed, the party obtaining the judgment must enforce it by a *mandamus*; and he against whom it has been rendered, if he thinks himself injured by the manner in which the execution is ordered, must seek relief by a *supersedeas*.

APPEAL from the District Court of Catahoula, Curry, J.

MORPHY, J. This court, at its last October term, rendered a final judgment, affirming, with five per cent damages, one taken from the Seventh District, in a suit No. 495, of *Taylor, Gardiner & Co. v. George W. Lovelace & Co.* The heading of the opinion is: "Appeal from the Court of the Ninth Judicial District, the Judge of the Fifth presiding." When this decree was presented to be recorded below, and a motion made in open court to have its execution ordered, it appears that the counsel for G. W. Lovelace & Co., opposed the motion, on the ground that this decree, purporting on its face to be rendered on an appeal from the Ninth District, could not be acted on by the court below, and rendered executory. The Judge* overruled the objection, and ordered the decree to be filed and rendered executory, on the 28th of November, 1842; but at the same time stated that, as it was a novel case, he would grant an appeal upon it, so that the Supreme Court might correct his judgment if erroneous. The counsel for

* Willson, J., presided at this term of the District Court. The injunction was also granted by him. It was subsequently dissolved by Curry, J., from whose decision this appeal was taken.

the defendants said that he would present a petition of appeal in due time or before the adjournment of the court. On the 29th of November, an execution issued, and on the 3d of December following, a suspensive appeal was prayed for and granted, from the order rendering the judgment of this court executory. Notwithstanding this appeal, Taylor, Gardiner & Co. proceeded with their execution, and on the 24th of December, the Sheriff seized a tract of land belonging to the defendant Lovelace, and advertised it for sale on the 4th of February, 1843. This sale G. W. Lovelace enjoined; and he prayed for damages against the plaintiffs in execution and the Sheriff. On a motion to dissolve this injunction, the Judge below pronounced its dissolution, with fifteen per cent damages, against George W. Lovelace and Michael B. Wells, the other defendant in the original suit, and their sureties on the injunction bond, on the amount of the judgment enjoined. From this judgment G. W. Lovelace has appealed.

The Judge below properly disregarded the erroneous statement heading the decree of this court. It was not required by law, made no part of the judgment, and might have been omitted; but after making an order for the execution of the decree of this court, he was clearly without any right or power to allow an appeal from it. In 11 La. 369, we said, that "the functions of the District Court in relation to a mandate which has issued from this court to have a judgment executed, are merely ministerial. It cannot render any new judgment which would authorize, or render an appeal necessary. Its duty is to obey the mandate. If it does not, the party obtaining the judgment, must seek its enforcement by an application for a *mandamus*; and the party against whom the judgment was rendered, if he thinks himself injured by the manner in which the execution is ordered, must seek relief by a *supersedeas*." The Judge below, it is true, heard evidence fully to satisfy himself of the error, before he would make the mandate executory, but he had no judgment to render. The judgment of this court had settled all the controversy between the parties, and his only province was to order the decree of the appellate court to be recorded on the minutes of his court, that it might be legally executed. Code of Practice, art. 619. As soon as this was done, the party in whose favor the judgment was rendered, had

an absolute and immediate right to an execution, which could not be suspended by any subsequent appeal, even if one could legally be taken. Code of Practice, arts. 623, 629. Under this view of the case, which renders it unnecessary to examine the various grounds on which the dissolution of the injunction was prayed for below, we think that the inferior Judge acted correctly in treating the appeal taken by the defendants in execution as a nullity, and in dissolving the injunction.

It is, therefore, ordered that the appeal taken from the order of the Judge below, rendering the judgment of this court executory, be dismissed with costs; and it is further ordered, that the judgment dissolving the injunction be affirmed, with costs in both courts.

Garrett, for the appellant.

Mayo, for the defendants.

HENRIETTA CHAPMAN v. PETER F. KIMBALL.

A surviving wife who has omitted to cause an inventory to be made of the effects left by her husband, however inconsiderable, in the manner prescribed for beneficiary heirs, cannot renounce the community. It is not enough that she present a petition to the Probate Court, praying that an inventory may be made; she must see that it is done. C. C. 2379, 2380, 2381, 2382. She is bound to point out to the Judge all the effects of the community, the concealment or making away with any part of which, will render her incapable of renouncing. Ib. 2387.

APPEAL from the District Court of Natchitoches, *King*, J.

Tuomey and *M. C. Dunn*, for the plaintiff.

Sherburne, *Dunbar*, *Elgee* and *Hyams*, for the appellant, contended, that the failure of the plaintiff to cause an inventory to be made, deprived her of the right of renouncing the community of *acquêts*. Civil Code, arts. 2382, 2383. She must not merely pray for an inventory, but cause it to be made. Ib. 1028. *Merlin*, *verbo* Inventaire, § 5, No. 2. 13 *Toullier*, No. 6, 134, 137, 141. *Pothier*, Com. Nos. 540, 558. She will not be excused from making an inventory, by any allegation, that no property was left

by the deceased. Nothing but the report of the officer charged with making the inventory, can show this. Pothier, Com. No. 565. Merlin, *verbo* Carence.

MORPHY, J. This is an hypothecary action, in which the petitioner seeks to enforce her legal mortgage on property in the possession of the defendant, formerly owned by her late husband, B. F. Chapman; she claims \$4014, as the price of a house and lot in the town of Natchitoches, her paraphernal property, received by him. The defendant disclaimed title, and prayed that his lessor Benjamin Metoyer, might be made a party. The latter, on being cited, answered that he was the *bona fide* owner of the property; that he had purchased it at a Sheriff's sale, made under an execution issued by the State Treasurer against B. F. Chapman, former Sheriff of the parish of Natchitoches, for the amount of the State tax of 1836, collected in the course of 1837, and withheld by him; that as Chapman's surety for the collection of the tax of that year, in a bond executed on the 2d of January, 1837, he has been obliged to pay a sum of \$5601; that this debt of the State, to whose rights he is subrogated, was a community debt, for which the petitioner is liable to him, as she has never renounced the community of *acquêts*, which existed between her and her late husband. The answer concludes by praying for a judgment in reconvention against the widow, for the said sum of \$5601. This reconventional demand was afterwards withdrawn by Metoyer, in a supplemental answer, whereupon, the case having been laid before a jury, there was a verdict and judgment for the plaintiff for \$1500, from which Metoyer has appealed.

Our first inquiry must be, whether the plaintiff has made herself liable for the debts of the community, which existed between herself and her late husband, for if she has, it is clear, that she cannot maintain this action. Our law gives to the wife and her heirs, the privilege of exonerating themselves from the debts contracted during the marriage, by renouncing the partnership or community of goods; but in order to enjoy this privilege, she must not have taken an active concern in the affairs of the community, and she must have made an inventory. If she has done the one, or has failed to do the other, she cannot renounce, and remains liable for one-half of the debts of the community. Civil Code,

arts. 2379, 2380, 2381, 2382. The surviving wife who wishes to renounce, is placed on the same footing as beneficiary heirs, in relation to the terms and formalities prescribed for making an inventory. Ib. arts. 1027, 1028. The record shows, that at the death of Chapman no seals were affixed on his effects, and no inventory of his estate taken. That he died in September, 1839; That in December following, the plaintiff presented to the Probate Judge of Natchitoches, a petition, stating that her husband died possessed of some property in that parish, and in that of Caddo, that he had left no heirs in the State, and praying that an appraisement and inventory might be made, and commissions issued to the parish of Caddo, &c. The Judge gave the order prayed for, and there appears to have been no further action in the matter, on the part of the plaintiff, until some time in July, 1841, when, shortly before the institution of the present suit, she went before a notary, and made a renunciation of the community. It has been contended, on the part of the widow, that it would have been a vain and useless formality to have made an inventory at the death of Chapman, because he left no property whatever; and several witnesses have been introduced to establish this fact. We are by no means prepared to say, that a surviving widow, who has failed to make the inventory required to enable her to renounce, can supply the omission by loose testimony in relation to the situation of her husband's affairs at the time of his death, several years before; but even if this could be done, the whole evidence on this subject does not satisfy us, that Chapman died without any means whatever, nor did his widow think so herself, as far as we can judge from her petition to the Probate Judge. The latter testified, that being satisfied that there was little property, less than \$500, he appointed, in July, 1841, one Anail curator of the estate, without requiring of him security, pursuant to the act of the 17th of January, 1838. One of the witnesses declares, that the deceased owned some land in Caddo up to the time of his death, and we find in the record, that a lot of ground in the town of Natchitoches, of the value of \$600, was given in 1834, to Chapman and his wife, which lot appears to have remained undisposed of. It is besides extremely improbable, that the deceased left no personal property of any kind. However in-

Wolf and others v. Rogers and others.

considerable may have been the estate left by her husband, the plaintiff was bound to have an inventory of it taken, if she intended to renounce. That obligation was not, in our opinion, complied with, by merely presenting to the Probate Judge a petition praying for an inventory. She was bound to see it made, and point out to the Judge all the effects of the community. The concealment or making away with any part of them, is declared by our code a sufficient cause to render her incapable of renouncing. Art. 2387. With the evidence before us, and under the positive provisions of our law, we are constrained to say, that the plaintiff has not made such a renunciation as will relieve her from the debts and obligations of the community, from which B. Metoyer bought the property from which he is now sought to be evicted, and that she cannot, therefore, maintain this action.

It is, therefore, ordered, that the judgment of the District Court be reversed, and that ours be for the defendant, with costs in both courts.

CHRISTOPHER WOLF and others v. DAVID M. ROGERS and others.

From the moment that one to whom a proposition is made for a contract, refuses to confirm it, the offer is at an end; nor can it be revived by his subsequent assent.

C. C. 1799. Such an offer must be accepted *in toto*, to render it obligatory.

A principal cannot plead ignorance of the acts of his agent.

APPEAL from the District Court of Rapides, *Campbell, J.*

Brent and O. N. Ogden for the appellants.

Dunbar, Hyams and Elgee, for the defendants.

MORPHY, J. This suit is brought upon a promissory note for \$6131 90, drawn by Rogers and Hazard, and endorsed by Joseph Walker, Patrick Barry, James Norment, and George W. Compton. The makers pleaded, that they were informed and verily believed, that James Norment, their co-defendant, is the owner of the note sued on, having been notified of the fact by the said Norment; that if such is the case, they owed nothing on this note, as Norment was indebted to them in an amount sufficient to

extinguish it by compensation. The endorers averred, that they were accommodation endorers, entitled to the benefit of the defence set up against the plaintiffs, and against James Norment, who, they alleged, was the true owner of the note sued on.

James Norment answered, that he endorsed the note, but that it got into the possession of the plaintiffs' agent, under certain conditions which were never complied with; that he is yet the owner of it, and is entitled to its restoration. He alleges, that the plaintiffs held certain notes of his, which it was agreed should be exchanged for the note sued on, and two drafts described in a receipt given for them; but that the agreement was not to be consummated, and the note sued on and the two drafts were to be returned, if E. C. Mielke, the agent of the plaintiffs at Vicksburg, refused to confirm the agreement; that the said agent did refuse to confirm the settlement, but retained in his possession the note sued on and the drafts, and also his, (Norment's,) notes, which were to be given in exchange. This defendant further averred, that he had already claimed the note sued on in his defence to a suit brought against him by the plaintiffs in May, 1841, on one of the aforesaid drafts. He prayed, that the two suits might be cumulated, and that there be judgment, deciding who is the true owner of this note. There was a judgment below in favor of Norment and his co-defendants. The plaintiffs have appealed.

The record shows, that on the 17th of December, 1839, James Norment being indebted to the plaintiffs, who were the holders of sundry notes of J. & G. R. Norment, agreed to give to their sub-agent, Turnbull, two drafts and the note sued upon, in exchange for the notes of J. & G. R. Norment, with the understanding and agreement, that should their principal agent, E. C. Mielke, of Vicksburg, not approve of and confirm the settlement, the note sued on and the drafts were to be returned to Norment through R. Chew, of Alexandria, in whose possession the original notes held by the plaintiffs were left, to be given up to Norment, or returned to Mielke, as the latter should agree to the arrangement, or not. On the 22d of January, 1840, Edward C. Mielke wrote to R. Chew, as follows:

"Dear Sir,—Some time ago, my agent, Mr. Turnbull, left in your hands, several notes drawn by J. & G. R. Norment, in fa-

vor of Wolf & Clark, to be handed over to Mr. J. Norment, in case of my approval of the securities received in lieu thereof. Finding several of the bills received protested for non-acceptance, I must beg you to retain the notes for my account, until Mr. James Norment can make other arrangements for their liquidation.

"Very truly, dear sir,

"Your obt. servt.

"EDWARD C. MIELKE."

This letter, in our opinion, put an end to the contemplated arrangement, and each party remained the owner of the paper he had intended to give in exchange. Had the note sued on, and the two drafts, been left in the hands of R. Chew, as the notes of J. & G. R. Norment were, he would not surely have felt himself authorized to retain them, when, in compliance with Mielke's instructions, he refused to surrender those which Norment was to have received under the agreement, if carried into effect. There was to be no contract unless Mielke, the plaintiffs' agent, consented to the proposed exchange. From the moment he expressed his refusal to confirm it, the contract was at an end, and could not be revived by the subsequent assent of the plaintiffs, or their agent. Civil Code, art. 1799. Mielke, when he repudiated the settlement made subject to his approbation, should at once have returned to Chew the note and drafts, which were the property of Norment. The proposition should have been accepted, executed, or rejected, *in toto*. 1 Robinson, 253. It has been contended, that R. Chew having treated with the plaintiffs as the owners of the note, and he having been the agent of Norment in negotiating the exchange, the latter must be bound by his acts: that besides, Norment knew that the plaintiffs had this paper, and that on being called upon by their attorney, he did not make known his claim, but said that he would write to them on the subject. These circumstances do not appear to us sufficient to authorize the conclusion which has been drawn from them. E. C. Mielke, who received the note sued on and the drafts from Turnbull, endorsed the note to the New Orleans Canal and Banking Company, whose Cashier, sent them up for collection to R. Chew, Cashier of the Branch at Alexandria. The latter knowing Mielke to be the

agent of the plaintiffs, could not but consider them as the owners of the note. But, be this as it may, it does not appear that R. Chew had any authority from Norment to renew the arrangement first contemplated, and which had been rejected by Mielke. As to the silence of Norment, when called upon by the counsel of the plaintiffs before the institution of this action, it does not, in our opinion, amount to anything, as he was not bound to disclose to the attorney any of the circumstances attending the transaction. He might have requested him to delay instituting the suit, with a view to correspond with the plaintiffs on his right to the notes sued upon. The latter intimated to R. Chew their intention to confirm and accept of the settlement made by Turnbull, and directed him to surrender their original notes to Norment, only on the 16th of June, 1841, long after the latter had asserted his title to the note and drafts, in consequence of the rejection, by their agent, of the proposed exchange. They say, that they were not until then apprized of this rejection; but they cannot plead ignorance of their own agent's acts.

Judgment affirmed.

JOHN T. WINN v. JOHN K. ELGEE.

The possession of a debtor against whom a judgment has been rendered, is divested by the legal seizure under a *feri facias*, and is vested in the Sheriff until the property is disposed of. He is regarded as the rightful possessor, and can maintain an action of trespass against any person disturbing him in such possession. It is his duty to take the property into actual possession. If it be a plantation, it remains sequestered in his custody until the sale, and he may appoint a keeper or manager; and if resisted in the execution of his orders, may employ force, and summon the *posse comitatus*. C. P. 656 to 662, and 762.

The legal effect of an adjudication under a *feri facias*, is to transfer to the purchaser all the rights and claims of the party in whose hands it was seized, (C. C. 2589. C. P. 690); and the Sheriff is bound, thereupon, to pass an act of sale to the purchaser, and to put him in possession of the property sold. C. P. 691.

After an adjudication under a *fi. fa.*, which divests the defendant in execution of his title to the property, he can no longer be considered as possessing as owner, which is essential to maintain a possessory action. C. P. 47. He must, if he still claims the property, resort to a direct action to annul the Sheriff's sale.



APPEAL from the District Court of Avoyelles, King, J. *Edelen*, for the appellant.

Elgee, and *T. H. Lewis*, for the defendant, and his warrantor.

MORPHY, J. This is a possessory action, in which the petitioner alleges, that on the 17th of March, 1842, a certain tract of land was sold and delivered to him by David Winn, who had possessed it as owner for several years previously, and that he (the petitioner) continued to hold it as owner until some time in November of the same year, when the defendant felled, and removed timber from said land, and took possession of a part of it, and committed other disturbances. He prays for damages, and to be quieted in his possession. The defendant, after pleading the general issue, answers, that he acquired by purchase from H. Taylor, with full warranty, the land which plaintiff avers he has illegally taken possession of, and prays that his vendor be cited in warranty. The warrantor pleaded, that he purchased the land at a sale made by the Sheriff of the parish of Avoyelles, on the 3d of September, 1842, which sale was made under an execution to satisfy a judgment in favor of Follain, Bellocq & Degelos against David Winn; that the land was sold with the consent and knowledge, and by the direction of the plaintiff, and that the Sheriff delivered to him possession of the premises, which he afterwards sold and delivered to the defendant Elgee, who has since been in the legal possession of the same; that if plaintiff ever had possession of the land, he has been divested of it, and that this suit is brought with the intention of indirectly attacking the Sheriff's sale to him, which could only be done in a direct action. There was a judgment below in favor of the defendant, from which this appeal has been taken.

The evidence shows, that on the 9th of August, 1838, David Winn, the plaintiff's vendor, executed a mortgage on the property in question, in favor of Lastrapes, Desmare & Co., to secure the payment of \$3250 25, payable in three notes, each for \$1083 41, falling due on the 1st of April, of the years 1839, 1840, and 1841. The two first notes were paid, and the last one was transferred to Follain, Bellocq & Degelos, who recovered a judgment on it in the District Court of Avoyelles, which was recorded on the 18th of November, 1841. On the 7th of March, 1842, David

Winn sold the land, thus mortgaged, to the plaintiff John T. Winn; and in this act of sale, the latter stipulated to pay a "debt due by his vendor to the former firm of Lastrapes, Desmare & Co. now belonging to Follain, Bellocq & Co. supposed to amount to fourteen, or fifteen hundred dollars," &c. On the second of June, 1842, an execution was issued; and by the clerk's endorsement thereon, the Sheriff was directed to seize the land mortgaged to Lastrapes, Desmare & Co. It further appears, that the plaintiff gave the Sheriff written instructions to seize and sell the property, "as though it was at present owned and held by David Winn," thereby waiving the necessity of proceeding against him as a third possessor. The seizure and sale were accordingly made, and the land was adjudicated to H. Taylor for \$1200, and by him sold to Elgee. The plaintiff having afterwards refused to allow the purchaser to take possession of the land, the Sheriff was applied to, and he put the defendant in possession.

Under these facts, it is contended on the part of the plaintiff, that the Sheriff had no power to give actual possession to the purchaser of land sold by him under execution, when to do so, it was necessary forcibly to expel the judgment debtor, &c.

Whatever may be the rights and obligations of Sheriffs in the execution of writs of *feri facias* placed in their hands in other States, we have no hesitation in saying that, under our laws, the Sheriff who makes a sale under execution, has the power of putting the purchaser in possession of the property thus sold. The possession of the judgment debtor is divested by the legal seizure under the writ of *feri facias*; it is vested in the Sheriff, until the property is disposed of; that officer is considered as the rightful possessor, and can maintain an action of trespass against any person disturbing him in such possession. It is made his duty to take into actual possession the thing seized. If it be a plantation, it shall remain sequestered in his custody until the sale, and he has authority to appoint a keeper, or overseer to manage it; and if, in the execution of his orders he meets with resistance, he may employ force, and may summon the *posse committatus* to overcome it. 5 Mart. 8, 268; 8 Ib. N. S. 661; 1 Robinson, 42; Code of Practice, arts. 656 to 662, 762. When the adjudication is made, its legal effect is to transfer to the purchaser all the rights and claims

which the party in whose hands the property was seized, might have had to it. Civil Code, art. 2598 ; Code of Practice, art. 690. The Sheriff is thereupon bound to pass an act of sale to the purchaser, and to surrender to him the possession of the property sold. Code of Practice, art. 691. After this adjudication, which divests the defendant in execution of his title to the property, he can no longer be considered as possessing as owner, which is an essential requisite to maintain the possessory action. Code of Practice, art. 47 ; 2 La. 227. The doctrine contended for by the appellant, would lead to the strange conclusion, that every purchaser at a sheriff's sale would be driven to the necessity of instituting a petitory action, to be put in possession of property he had bought and paid for.

It has been further contended, that the adjudication transferred no rights whatever to the purchaser, because the certificate read by the Sheriff at the time of the sale, showing the existence of a special mortgage in favor of Lastrapes, Desmare & Co., for \$3250 26, and the bid of H. Taylor not exceeding that sum, no adjudication could legally take place. To this it has been answered satisfactorily, we think, that although the proposition be true in general, it has no application to this case, because the sale was made under, and for the purpose of paying that very special mortgage, or the balance due on it ; that this fact was well known to the plaintiff, who, in his purchase from D. Winn, stipulated to pay that very debt ; and that the sale would have been legal, even if no part of this special mortgage had been previously paid. Code of Practice, art. 685. But this point might not have been considered, as it is clear that the plaintiff, having been divested of any possession he ever had of the property in question, cannot maintain a possessory suit, and should have resorted to a direct action to annul the Sheriff's sale.

Judgment affirmed.

NANCY ALLEN v. DAVID E. ALLEN, Administrator of the Succession of Edwin Allen.

The rights of married persons are not to be regulated by the laws of the State in which the marriage is celebrated, when it appears that it was their intention to remove immediately, and fix their residence in another country.

Where the record contains no evidence of the laws of another State, according to which it is contended that the case should be decided, it must be determined by our own laws.

The property which a wife inherits during marriage, is, according to the laws of this State, separate and paraphernal.

A plaintiff on recovering a slave, will not be compelled to pay for the food and clothing of her children while in possession of defendant, where the value of her services was equivalent to any such expense.

APPEAL from the Court of Probates of Ouachita, *Lamy, J.*

Downs and *B. W. Richardson*, for the appellant. The record containing no evidence of the laws of Mississippi, this case must be decided by our own. Though married in Mississippi, the intention of the parties was to reside in this State, and their rights must be governed by our laws. 3 Mart. 61. 2 Ib. N. S. 574.

Baker, for the defendant.

MARTIN, J. The plaintiff is appellant from a judgment setting aside her opposition to the sale of certain slaves, which she claims as her property, but which were taken possession of and inventoried by the defendant, the administrator of her deceased husband, as part of his estate. She avers, that she was married in the territory of Orleans, in the year 1806; that, in the year 1817, her father died, and she inherited from him, a female slave named Penny, who was delivered to her said husband, in whose possession she continued until his death, and afterwards came into her possession, as her property.

The defendant pleaded the general issue, averring, that the plaintiff was married to his intestate in the State of Mississippi, and resided with him, in that State, at the death of her father, where he reduced the slave Penny to possession; and that, sometime after, he removed with the plaintiff into the State of Louisiana.

In answer to interrogatories propounded to her by the defend-

Allen v. Allen, Administrator.

ant, the plaintiff stated, that her marriage was solemnized in the territory of Mississippi, but that the parties were then residents of the territory of Orleans, and that the reason of their going over to the territory of Mississippi to be married, was the absence of any magistrate within a convenient distance in that of Orleans; that, at the time of her father's death, she, and her husband, lived in the State of Mississippi, and that they received the slaves there, in 1818, her father having died the preceding year; that two years after, she and her husband removed to Fairchild's Island, in the Mississippi River, where they resided six years, and which she has understood, is now a part of the State of Mississippi; and that one of the children of Penny was born in Mississippi.

The Court of Probates appears to have been of opinion, that the title of the plaintiff to the slave Penny, and the children she afterwards had, is to be considered under the laws of the State of Mississippi; and the counsel of the plaintiff and appellant contends, that it is to be considered under the laws of this State. The facts which are to govern our decision, are not clearly shown in evidence. Indeed, we must draw them principally from the plaintiff's answer to the interrogatories of the defendant. She states, that she and her future husband, resided in the territory of Orleans before their marriage, and that they went over to the territory of Mississippi to be married, because a magistrate could not be conveniently had in that of Orleans. The rights of spouses are not to be regulated by the laws of the State in which the marriage is celebrated, when it appears, that they immediately intend to remove and fix their residence in another country. The plaintiff does not state, in which of these territories they intended to settle. She merely informs us, that she was not married in the territory of Orleans, for a reason which induces but a probability that after the marriage, the spouses intended to settle in the territory of Orleans. She next informs us, that they lived in the State of Mississippi, in 1817, when her father died; but she does not say a word about their returning to the territory of Orleans, after the celebration of the marriage, nor how long they remained in it. The year following the death of the plaintiff's father, the slave Penny was brought to them, and two years after they removed to

Fairchild's Island, which the plaintiff informs us, is in the State of Mississippi. It appears, that the husband died in the parish of Ouachita, about the year 1842.

On these facts, the Court of Probates concluded, that the circumstance of the future spouses crossing the river in search of a magistrate, and their previous residence in the territory of Orleans, afforded no conclusive evidence of the place which they considered as that of their intended settlement; that the court could not well presume, that they intended to return to the territory of Orleans; and that the laws of the State of Mississippi must, therefore, regulate the marital rights of the parties.

It is of no importance for us to examine whether the court erred, as the record contains no evidence of the laws of the State of Mississippi, and our decision must be regulated by the laws of our State, according to which, the property which the wife inherits during the marriage, is her separate or paraphernal property. She is, therefore, entitled to the slave Penny and her increase, whether born in one State or the other.

The defendant has claimed compensation for the feeding, clothing, &c., of the children; and has urged, that the mother was chiefly employed in nursing them, and was a charge on the husband. The defendant admits, that the slave Penny was ten years of age, at the death of the plaintiff's father, and the intestate had the use of her services during twenty-four years. Caroline, her first child, was born in 1827, and was fourteen years old at the death of the intestate. At her birth, the mother was twenty years of age. Charles was born in 1829, and was about twelve years of age. Rose, the last child, was born in 1832, and was ten years old at the death of the intestate.

We are of opinion, that the labor of the mother, during the nine years which preceded the birth of her first child, and for eleven years thereafter, sufficiently compensated the expenses of the feeding, clothing, &c., of her three children, until they were able to labor as hands.

It is, therefore, ordered that the judgment of the Court of Probates be annulled; that the plaintiff's opposition to the sale be sustained; that the slave Penny, and her three children, Caroline, Charles, and Rose, be declared her property; that the order of

 Succession of Goodrich—Copley, Appellant.

the Court of Probates for their sale be rescinded; and that the defendant pay the costs of suit in both courts.

SUCCESSION OF CHAUNCEY GOODRICH — GEORGE W. COPLEY,
Appellant.

Purchasers at Sheriff's sales cannot be affected by irregularities occurring after the sale—no act of the Sheriff, subsequent to the sale, can affect his rights. The adjudication made by him has, of itself, the effect of transferring to the purchaser all the rights and claims of the party in whose hands the property was seized. C. P. 690. It is the last proceeding which concerns the purchaser; it fixes his condition, and is the basis of his title.

The return of the Sheriff on a *feri facias* is not conclusive as to the facts stated by him, and the purchaser cannot be prejudiced by it. Parol evidence is admissible to explain any ambiguity in it, and to show, beyond the contents of the return, that the formalities required by law for the validity of Sheriff's sales had been complied with, and how they were fulfilled.

One claiming under a Sheriff's sale who produces the judgment, execution, and Sheriff's return, showing the adjudication to him, has nothing else to show in support of his title. It is for the opposite party to establish any irregularity or informality in the sale.

APPEAL from the Court of Probates of Ouachita, Lamy, J.
Copley, appellant, *pro se*.

McGuire, contra.

SIMON, J. This case was before us last year, (see 3 Robinson, 100,) and was remanded for further proceedings. Since then, the subject matter of this controversy has been regularly tried before the lower court, and judgment having been rendered against Copley, he has appealed.

The facts of the case are these: J. E. Faulk, sometime in February, 1836, having sold a tract of land to one Baker, retained a mortgage thereon to secure the price. In October following, Baker sold the same land to Goodrich, received a part of the price in cash, and took two notes for the balance, to wit: one for \$875, payable on the first of February, 1837, and another for \$1000, payable on the first of February, 1838. A mortgage was also retained to secure the payment of the notes. In September, 1837,

Faulk sued Baker for the amount due on the price of the land, and obtained a judgment against his debtor, by virtue of which a writ of execution was subsequently issued. This execution was levied upon the two notes given to Baker by Goodrich, and these notes were adjudicated at a Sheriff's sale to Faulk, for the sum of \$915 cash, being two-thirds of the appraisement. This took place in the beginning of the year 1838, and the Sheriff's return, which is very incomplete, does not show how or to what extent the formalities of the law were complied with, except that he states that the notes were duly advertised for sale.

At a subsequent period, (January, 1841,) Copley, who had obtained a judgment against Baker, issued an execution by virtue thereof, which was levied upon the two notes of Goodrich, though those notes were not produced, and they were, after due proceedings, adjudicated to Copley for the sum of *five dollars*, payable at twelve months credit.

The present suit is brought by G. W. Copley, the purchaser of said notes at the last Sheriff's sale, against Faulk, as the curator of the estate of Goodrich, in order to recover the amount thereof from said estate; and said curator alleges, that the debt claimed does not belong to the petitioner, but to himself (Faulk) individually.

On the trial of this cause below, Faulk introduced several witnesses for the purpose of explaining the Sheriff's return on the first execution, and of proving facts connected with the sale, so as to establish the legality of the Sheriff's proceedings. This was objected to by Copley; but the Judge, *a quo*, having received the evidence to explain an ambiguity and to identify the notes, but not to contradict the Sheriff's return, Copley took his bill of exceptions.

We think the Judge, *a quo*, did not err. It is a well recognized principle in our jurisprudence, that purchasers at Sheriff's sales cannot be effected by irregularities which occur after the sale, (3 Mart. N. S. 490;) and we agree with the counsel of Faulk, that no act of the Sheriff, after the sale of personal property, can affect the purchaser's rights, provided he prove that the sale was made in a legal manner. Article 690 of the Code of Practice says, that "the adjudication made by the Sheriff has, *of itself alone*, the ef

fect of transferring to the purchaser all the rights and claims which the party in whose hands it was seized might have had to the thing." Thus, the adjudication once legally made, it matters not how the Sheriff makes his return, as the purchaser has nothing to do with the subsequent formalities, and is not to be affected by any subsequent irregularities. Now, the object of the evidence admitted by the lower court was, to explain the Sheriff's return, in relation to an ambiguity which exists in it, and to identify the notes sold. It might have been introduced to show, beyond the contents of the return, not only that the legal formalities had been complied with, but also how they were fulfilled, as the statement of the Sheriff not being conclusive as to the facts therein contained, the purchaser cannot be prejudiced by the manner in which the Sheriff makes his return. The adjudication, in the sense of the law, is the last proceeding which concerns the purchaser; it fixes his condition under it, and is the basis of his title. 14 La. 17. We are of opinion, that Faulk was properly allowed to introduce parol evidence, to explain an ambiguity in the Sheriff's return, (9 La. 565; 15 La. 312,) and even to show that the formalities required by law for the validity of Sheriff's sales, had been regularly complied with.

On the merits the evidence shows, that at the time of the sale to Faulk, Copley interfered with the sale; that he caused the Sheriff to postpone it, and to re-advertise it; that Copley knew that said sale was to take place, and that the debt which the Sheriff was about to sell was the same due by Goodrich, for the purchase of the land. The Sheriff who made the first sale, states that Copley came and forbade the sale, whereupon he postponed it, thinking that Copley was Baker's attorney, and had a right to interfere. It is further shown, that when Copley ordered the Sheriff to seize and sell the notes on the second execution issued at his own request, the latter told him that he could not do it, as they had already been sold previously at the suit of Faulk. Copley told the Sheriff to go on with the sale, that it was none of his business where the notes were, and that they must be sold. Another witness proves, that previous to the second sale, Copley examined carefully the return on the first execution, and then ordered the Sheriff to seize the rights of Baker to the notes, and to sell them

under the execution, under which he pretends to have bought them.

With regard to the legal formalities, it seems to us that the evidence shows satisfactorily, that they were regularly complied with. Notice of seizure was served on the party, as also a notice to appoint an appraiser. The return of the Sheriff shows, that the sale was duly advertised, and that the notes were adjudicated to Faulk for two-thirds of the appraisement. If any irregularities exist in the sale, or if any of the legal formalities were neglected by the Sheriff, it was the duty of Copley to establish them; for, Faulk, after having produced the judgment, execution, and Sheriff's return showing the adjudication, had nothing else to show in support of the validity of his title. 8 La. 423; 9 La. 542; 16 Ib. 422, 554, and 19 Ib. 307.

Upon the whole, we are induced to believe from the evidence, that this is an attempt to carry into effect an unjust speculation. Copley, being an attorney at law, thought, perhaps, that Faulk's title, from the vague statement made by the Sheriff in his return, was defective; and that, by selling the notes a second time, he might perhaps succeed in annulling the sale made to Faulk. For this purpose he procured an execution to issue at his own suit, had the notes seized, and carried his bid at the second sale to the sum of *five dollars* only, and this sum to be paid at twelve months' credit; no one, however, having bid more, the notes were adjudicated to Copley, although he must have known at the time, that Faulk paid \$915 cash for the same notes. However it may be, we cannot but express our regret and dissatisfaction, that the present suit should have been instituted by a member of the bar in his own name; but he may rest assured that such a transaction, which discloses a disposition to turn the laws of our country into a mere object and instrument of speculation, shall never receive any sanction at our hands.

Judgment affirmed

Board and another v. De Russy, Sheriff, and others.

JEAN BAPTISTE O. BUARD and another v. JOHN A. DE RUSSY,
Sheriff, and others.

Dowry being the effects which the wife brings to the husband to support the expenses of the marriage, (C. C. 2317,) the income from it, though belonging to the husband, is intended to help him to support the charges of the marriage, such as the maintenance of the husband and wife, their children, &c. Ib. 2329. Such income cannot be seized under execution, or made liable to the payment of debts, the object of the law being to secure to the family, under any circumstances, the means of existence. The act of 22d March, 1842, chap. 128, which provides that the Sheriff shall in no case seize the income of dotal property, was merely declaratory of the law previously in force.

APPEAL from the District Court of Natchitoches, King, J.

Pierson, for the appellant.

Sherburne, for the defendant, contended that the income of dotal property may be seized, though not *the right to the income*, citing Toullier, vol. 12, Nos. 401, 402.

SIMON, J. Several executions which had been issued against William Y. Fleury, and Henry M. Fleury, by virtue of judgments obtained on notes signed by Fleury & Brothers, a late commercial firm, composed of the said William, Henry, and Abraham J. Fleury, were levied upon twenty-five bales of cotton, grown on, and found by the Sheriff at the plantation owned by the plaintiffs, and by them cultivated in partnership. The plaintiffs represent, that the cotton seized is the product of their said plantation purchased by them on the 12th of June, 1838, before the marriage of the petitioner, Nathalie Fleury with William Y. Fleury; that they are the owners, in undivided moieties, of said cotton; that Nathalie was married to William Y. Fleury, on the 5th of June, 1839; that the debts of her husband anterior to the marriage, cannot by law be paid out of the proceeds of her dotal property; that the debts for which said executions were issued, were owing by her husband, and contracted before said marriage with her; and that maintenance is due to her and her family out of the income of her dotal and separate property, &c.

The plaintiffs further allege, that there is a partnership existing between them, by private act, dated 12th of June, 1838, in car-

Buard and another v. De Russy, Sheriff, and others.

rying on said plantation, and that said plantation and partnership are indebted in the sum of \$4500, which must be paid out of the produce thereof, &c; wherefore, they pray that an injunction may be issued to arrest the sale of the cotton seized; that the same may be perpetuated, and that the seizing creditors and the Sheriff be condemned to pay, *in solido*, the sum of \$1000 damages, for the illegal seizure of the cotton, &c.

The seizing creditors and the Sheriff joined issue by denying the allegations of the petition, and prayed that the injunction might be dissolved, with damages and costs.

This case was tried before a jury, who, under a charge of the court, to which the plaintiffs excepted, returned a verdict dissolving the injunction as to Nathalie, the wife of William Y. Fleury, for one-half of the cotton; and making it perpetual, as to the other plaintiff J. B. O. Buard, for the other half of said cotton. Whereupon, the court, *a qua*, rendered judgment, allowing further in favor of the seizing creditors, interest at ten per cent, to be paid by Nathalie, and her security in the injunction bond. From this judgment, the plaintiffs, after an unsuccessful attempt to obtain a new trial, took the present appeal.

It appears from the evidence, that the plantation and slaves which produced the cotton seized, were purchased by the plaintiffs from their mother, on the 12th of June, 1838; that on the same day, a partnership was contracted between the purchasers, by act under private signature, (the date of this act is not positively shown to have been on the day it purports, but its existence previous to the marriage of Nathalie is satisfactorily established,) for the cultivation of said plantation, under the management and control of J. B. O. Buard; the profits whereof were to be equally divided between the partners. It is further stipulated in the act, that the partnership is to last ten years, and shall not be dissolved by the death, or any other change in the condition of the parties. It is also shown that, on the 5th of June, 1839, Nathalie Buard, and William Y. Fleury entered into a contract of marriage in which it is stated that the wife brings into the marriage, the one-half of the plantation and slaves purchased by herself and her brother from their mother, &c.; and that the partnership existing

Buard and another v. De Russey, Sheriff, and others.

between them, owes yet a sum of \$50,000, as part of the purchase money.

The record also shows, that the cotton in question was seized on the 14th of December, 1840, at the suit of creditors of the firm of Fleury & Brothers, to satisfy debts due by the said firm, anterior to the marriage of one of its members; and it is admitted that Mrs. Fleury has two children, that her husband is living, that the average crop raised on the plantation, is about 200 bales annually, and that the 25 bales seized, were grown on the said plantation.

With regard to that part of the judgment which perpetuates the injunction as to J. B. O. Buard's portion of the cotton, the appellees not having prayed in their answer, that said judgment be amended, the same must remain undisturbed.

The only question which this case presents is, whether the income of Mrs. Fleury's dotal property, can be seized to satisfy her husband's debts, contracted anterior to the marriage? The solution of this question does not, in our opinion, present much difficulty; but we find in the record, a bill of exceptions taken to the charge of the lower court to the jury, in which the Judge, *a quo*, appears to decide it in the affirmative. He says: "The revenues from dotal property, as well as community property, can be seized under execution, to satisfy a debt due by the husband, contracted anterior to marriage. If the contrary were true, marriage might operate as a bar to the recovery of such debts, as would happen when the husband was indebted at the time of marriage, without separate property owned at that time, or subsequently acquired, with which to extinguish them." The jury returned their verdict accordingly.

We are of opinion that the Judge erred. By dowry, (*dot*.) says art. 2317 of the Civil Code, is meant the effects which the wife brings to the husband, *to support the expenses of marriage*, and the income of the dowry, although belonging to the husband; is intended to help him *to support the charges of the matrimony*, such as the maintenance of the spouses, that of their children, &c. Civil Code, art. 2329. The object of the law, therefore, is very clear—that the income of the wife's dotal property, is particularly to be employed in sustaining the family, and procuring them all the necessaries of life. For that purpose, our code contains a

provision, which preserves the income of the dotal property from being subject to be seized by creditors ; and this provision was undoubtedly adopted, in order to attain the object of the law maker, that the family should not be deprived of the necessary means of existence, in case, from the bad conduct of the husband, or from his bad management of his affairs, he became unable to support his family. The 1987th art. of the Civil Code provides, that there are rights which cannot be made liable to the payment of debts, such as *the right to the income of dotal property*. This last article appears to us so clear, that although it has been contended earnestly by the defendant's counsel, that the law does not mean that *the income itself*, should not be subject to seizure, but only *the right* to the income, and that the revenue might be seized, although the right to it could not, we are not prepared to construe it in any other manner, but as containing a positive prohibition from seizing the proceeds or income of the wife's dotal property. We are confirmed in this opinion, by a law passed by the Legislature in 1842, (Session Acts, p. 380,) in which it is enacted, that *the sheriff shall in no case seize the income of dotal property*. This law may be considered as declaratory of the previous law, and as such, although it was not in force at the time the seizure under consideration took place, may be used by us to arrive at a proper interpretation of the law which it has a tendency to explain.

With this view of the question, the judgment of the lower court, based upon a verdict which is evidently the result of the erroneous charge of the Judge, *a quo*, must be reversed ; but as the fact of the cotton seized being a part of the income of one of the plaintiffs' dotal property, is clearly established, and appears to be undisputed, it seems to us unnecessary to remand the case for a new trial.

It is, therefore, ordered, that the judgment of the District Court, so far as it dissolves the injunction obtained by the plaintiffs, as to Mrs. Fleury, and condemns the latter and her surety to pay ten per cent interest, be annulled, and reversed ; that said injunction be made perpetual, *in toto* ; and that the rest of the judgment appealed from be affirmed, the costs in both courts to be paid by the defendants and appellees.

WILLIAM COTTON v. JOHN S. BRIEN.

The provision of the constitution of the State of Mississippi, which declares, that "the introduction of slaves into this State as merchandize, or for sale, shall be prohibited from and after the first day of May, 1833," is not merely directory to the Legislature, and inoperative until it shall prohibit their introduction under appropriate penalties. It is prohibitory *per se*, rendering any contract void made in contravention thereof.

Questions which concern our own citizens, although growing out of the constitutional or legislative provisions of another State, will be regarded as new ones, where there is a conflict between the tribunals of the State and of the United States as to their proper construction.

Whatever is done in contravention of a prohibitory law is null and void, though no penalty be denounced by the law for its violation. So of every act contrary to public policy. Their nullity is pronounced by the general principle of the law, and is applied by the courts as cases may arise.

The legislative authority has no power to fix, by a declaratory act, or otherwise, a construction of the constitution of the State, which shall be binding on the judicial department. If the courts occasionally rely upon legislative construction of acts of ordinary legislation, it is because, as to them, the Legislature has a right to repeal, or modify them, or to settle their construction in cases of ambiguity, by a declaratory act.

Where notes were given by defendant and another person, for a purchase made in violation of a prohibitory law rendering the transaction null and void, the substitution of a single note by defendant alone for a balance due after a part payment, will not bar the latter from pleading the illegality of the original contract. *Per Curiam*. The debt does not cease by the release of one of the original debtors, to be the same debt, growing out of the same transaction.

APPEAL from the District Court of Madison, Curry, J.

Shannon, for the plaintiff. The clause of the constitution of Mississippi prohibiting the introduction of slaves into that State for sale, after the 1 May, 1833, is in violation of the provision of the constitution of the United States, giving to Congress the power "to regulate commerce among the several States." See opinion of Baldwin, J., 5 Peters, 511. *Gibbons v. Ogden*, 9 Wheaton, 186, 222. *Brown v. State of Maryland*, 12 Ib. 438, 446. Though constitutional, the prohibition to introduce slaves for sale was inoperative, until put in force by a law denouncing a penalty for its violation. See the decision of the Supreme Court of the United States to this effect, 15 Peters, 496. The substitution of

the note now sued on, signed by Brien alone, for those of Brien and Young, and for a less amount, was a novation of the debt, curing any illegality that might have existed. 11 Wheaton, 262. Story's Conflict of Laws, 2d ed., § 249. *De Wolf v. Johnson et al.*, 10 Wheaton, 367. Condensed Reports of Sup. Court, Vol. 6, p. 140.

Stockton and Dunlap, for the appellant.

BULLARD, J. This is an action upon a promissory note, and the defence relied on is, that it was given for the purchase of slaves in the State of Mississippi, which had been introduced into that State as merchandize, and for sale, after the 1st day of May, 1833, in violation of the constitution of that State, which declares, that the introduction of slaves into this State as merchandize, or for sale, shall be prohibited from and after the first day of May, 1833.

The case brings before us a question much agitated of late, to wit; whether that clause in the amended constitution of Mississippi, be, *per se*, prohibitory, so as to render void any contract made in contravention of it, or whether it is to be regarded as merely directory to the Legislature, and inoperative until the Legislature should have pronounced the prohibition, under appropriate penalties.

In the State of Mississippi, this can no longer be regarded as an open question. Several decisions of the highest court of that State have been brought to our notice, and particularly that of *Brien v. Williamson*, decided last March, in the High Court of Errors, since the judgment pronounced by the Supreme Court of the United States, in the case of *Groves et al. v. Slaughter*, 15 Peters, 449. The decisions in that State have uniformly been, that the constitution settled the public policy of that State, prohibited the introduction of slaves as merchandize, or for sale, without the necessity of any legislative enactment, and that any contract entered into in violation of the constitution is void.

On the other hand, the Supreme Court of the United States, in the case above referred to, of *Groves et al. v. Slaughter*, held, that the prohibition of the constitution did not invalidate the contract, but that an act of the Legislature of the State was required

to carry it into effect, and that no law on the subject of the prohibition in the constitution was passed, until 1837.

Very great respect is due undoubtedly to the decisions of the highest State courts upon questions relating to their constitution, policy, and laws. The authority of the Supreme Court of the United States is also very high, and deserving of the greatest respect. But upon questions which concern our own citizens, although growing out of the constitutional, or legislative provisions of a sister State, when there is a conflict between the Federal and State tribunals, as to the just construction of such provisions, we feel authorized to look upon the question as a new one, and to decide for ourselves.

We have always considered the constitution of the State as the Supreme law, not liable to be altered, or modified by any act of ordinary legislation, and as indicating the will of the sovereign authority of the State, not only upon the form and organization of government, and the distribution of its powers, but upon many questions of domestic policy. When, for example, we find in the constitution of Ohio, a solemn declaration, that slavery, or domestic servitude, shall not be permitted, except by way of punishment for offences, we have regarded it as carrying in itself such paramount authority, that we have held, that the master of a slave who suffered him to live in that State, subjected him to the operation of the law, and that he became thereby free; that the master must be regarded as having tacitly assented to his emancipation. We further regard it as a well settled doctrine, not only of our local law, but of every system of jurisprudence, that whatever is done in contravention of a prohibitory law, is null and void, as well as every act contrary to public policy. The prohibitory law may denounce no punishment, may threaten no penalties, may provide for no forfeitures or disabilities, yet the nullity of all contracts and acts entered into, or done in defiance of the will of the sovereign authority, is pronounced by the general principle of the law, and applied by the courts to cases as they may arise. The constitution of the United States forbids the emitting of bills of credit, by the States; but that provision is, in common, we believe, with all constitutional provisions, without any declared sanction, and yet it never was doubted, that such

bills of credit, and any contract which concerns them, or of which they form the consideration, are void, and of no effect. The courts apply, perhaps, the most effectual of all penalties, that of the nullity of all contracts reprobated by the Supreme law, by refusing to the parties any action to enforce them.

The argument, therefore, which has been drawn from the fact, that the clause in the constitution of Mississippi contains nothing more than a naked prohibition, without sanction, without declared penalties, or forfeitures, by which it is to be rendered effectual, and which shows, that the convention looked to a future Legislature to give it effect as a prohibitory law, has no force with us. It is clear the Legislature had no authority to repeal, modify, or suspend that clause in the constitution; and there is nothing in the clause itself, nor in the context to induce us to suppose, that the convention intended, that the efficacy of the prohibition should depend upon the future action of the Legislature. The people of Mississippi had already announced as the future policy of the State, that the introduction of slaves into the State, as merchandize, or for sale, should no longer be tolerated, after the first of May. It is true, no punishment was threatened; but it is also true, that although the Legislature might create penalties, it could not render the introduction of slaves after that period lawful; and although the courts of the State could not, perhaps, punish directly their introduction as a criminal offence, yet they were bound, in our opinion, to regard the clause in the constitution, as fixing the public policy, and consequently to declare void any contract growing out of the sale of slaves, illegally imported into the State. It is in this way alone, that constitutional provisions, in general, are enforced. The Legislature, at most, could have declared, what punishment should be inflicted on the importer, or the vendor, and what disposition should be made of the imported slaves. But it has no discretion left. The prohibitory clause was not, in our opinion, merely mandatory to the Legislature, but carried within itself the high, the paramount authority of the popular will. It was so binding on the judicial department as the supreme law, that if the legislature had assumed to tolerate that species of commerce after the 1st of May, 1833, the

courts would have been bound to declare such enactments unconstitutional and void.

But it has been urged, that the legislative construction of the constitution has been adverse to this view of the matter. In support of the argument we are told, that previously to 1st of May, 1833, a law was passed to alter and amend the article in question, and vest in the Legislature discretionary power, to regulate, or prohibit the introduction of slaves into the State. Such a change required the concurrence of two-thirds of both branches of the Legislature, and the question was referred to the people. But no modification was sanctioned. Now it is said, that the Legislature could not then have considered the prohibition as in full force, while these proceedings were in progress to take the sense of the people upon the proposed amendment of the constitution. It appears to us, that when the Legislature proposed that it should be invested with discretionary powers, instead of leaving the constitution as it then stood, it cannot fairly be inferred, that the efficacy of the prohibition depended on the legislative will. Otherwise they would have had nothing to do, but to remain silent, and pass no law; and that, according to the argument, would effectually have defeated the popular will, as expressed in the constitution. But the proposition to amend, in our opinion, admits the obligatory force of that clause in the constitution.

It is further said, that the terms of the act of 1837, confirm this legislative construction. That act merely repeats, in substance, the prohibition contained in the constitution, by declaring, "that hereafter the business of introducing, or importing slaves into this State, as merchandize, or for sale, be and the same is hereby prohibited." It is urged, that from the terms of this act, it was the sense of the Legislature, that from 1833 until its passage, in 1837, the constitutional inhibition was inoperative.

Admit, for the sake of this argument, that it was so. Since when does the judicial power look to the Legislature for an interpretation of the constitution? If the courts occasionally rely upon the legislative construction of acts of ordinary legislation, it is because, as to them, the Legislature has a right to repeal, to amend, to modify, and by a declaratory law to settle their construction, in cases of doubt or ambiguity. But the constitution is above

Satterfield v. Compton and others.

the reach of legislative amendment or change; and although the Legislature may interpret that instrument for itself, in reference to its own action, it is without authority to fix, either by a declaratory law, or tacitly by a series of enactments, a construction of the constitution, which shall be binding on the judicial department. If it were otherwise, then the judicial department would become entirely subordinate to the legislative.

It is shown, that slaves were sold by the plaintiff to the defendant and one Young, for which notes were given by them, and that afterwards Brien took up the notes first given, and subscribed the one now sued on, for the same consideration, a deduction being made of five hundred dollars. It has been argued, that this is a novation of the debt, and that Brien alone cannot avail himself of the illegality of the original contract. We are not of that opinion. If the plaintiff chose to release one of the original debtors, upon the others giving him further security, it does not cease to be the same debt, growing out of the same transaction.

Upon the whole we conclude, that the contract was in violation of the prohibitory clause in the constitution of Mississippi, and consequently void and without effect.

It is, therefore, ordered, that the judgment of the District Court be avoided and reversed, and that ours be for the defendant, with costs in both courts.

E. H. SATTERFIELD v. ALEXANDER COMPTON and others.

The possession of a note by the maker, after it has been endorsed by a third person, is evidence that the endorsement was an accommodation one.

An accommodation endorser, being viewed as a surety, may avail himself of any plea which his principal could have opposed to the holder.

On a plea of usury by the maker or accommodation endorser of a note, the holder will be entitled to recover only the amount actually paid by him.

APPEAL from the District Court of Rapides, *Campbell, J.*

Dunbar, Hyams and Elgee, for the plaintiff.

Brent and O. N. Ogden, for the appellant.

MARTIN, J. This is an action against the maker and endorsers

Satterfield v. Compton and others.

of a promissory note.* The maker pleaded usury. The three endorsers filed separate answers. Texada, the first, pleaded, that he endorsed the note as an accommodation to the maker, for the sole purpose of enabling it to be discounted in bank, which was not done; that the maker promised him he would destroy the note, notwithstanding which, shortly before its maturity, the maker sold it to Martin, the last endorser, for the sum of one thousand dollars, it being for sixteen hundred and fifty dollars, who transferred it to the present plaintiff, the transferer and the transferee being cognizant, at the time of the transfer, of the circumstances under which the note had been endorsed by him, Texada; that Bryce and Martin, second and third endorsers, are mere nominal defendants, having been made parties for the sole purpose of depriving Texada of the benefit of their testimony. Bryce, the second endorser, pleaded, that he was a mere accommodation endorser, for the purpose of enabling the note to be discounted in bank, and that he is not liable, because his endorsement, to the knowledge of the plaintiff and subsequent endorser, was used for a different purpose from that for which it had been given. Martin, the last endorser, pleaded the general issue, and admitted his signature only.

The plaintiff, in answer to interrogatories of the maker, stated, that Martin had purchased the note for the joint account of the plaintiff and himself, for the sum of one thousand dollars; that he afterwards bought it from Martin; that he did not know that the purchase of the note, after it had been offered for sale by the se-

* The note sued on was in these words :—

" November 1st, 1836.

" \$1650.

" Twelve months after date, I promise to pay to order of John A. Texada, sixteen hundred and fifty dollars, value received, negotiable and payable at the office of discount and deposit of the Bank of Louisiana, at this place.

" ALEX. COMPTON."

It was endorsed " JNO. A. TEXADA,
J. G. BRYCE.
R. C. MARTIN."

The words "*credit the drawer, J. G. B.*" on the back of the note, were crossed out by a pen.

cond endorser and others, was usurious. To the interrogatories of Texada, he answered, that Martin purchased the note for his own account, and for his, the plaintiff's. He denied, that he acquired the note from Bryce, the second endorser, with the knowledge that it was offered for sale for the benefit of the maker, or that he had any conversation with the latter; that a few weeks before he purchased the note, Martin purchased it for one thousand dollars, but it cost him, plaintiff, one thousand and seventy dollars, five hundred dollars for his part of the original purchase, and five hundred and seventy dollars for the purchase of Martin's share; that Martin's purchase was made in July, 1837, and that he purchased Martin's share, in December, 1837.

Bryce deposed, that the note was brought to him for his endorsement by the maker, after it had been endorsed by Texada; that he thinks Compton said something about its being discounted in the Bank of Louisiana; that the maker's credit was then on the wane; that at his request, he wrote on the face of the note that it was to be credited to the maker; thinks that after the refusal of the discounting of the note, the maker called on him for assistance in raising money thereon; that this could not be effected except at a ruinous discount; that he believes he offered it to Satterfield or Martin, at the plaintiff's request; and that he, witness, erased the words "credit the drawer," which he had written on the face of the note. The Cashier of the Branch of the Louisiana Bank in Alexandria testified, that the board is in the habit of allowing notes discounted by them to be renewed on the payment of the interest, and sometimes a very small part of the capital, but that they do not consider themselves under any obligations so to do; that this, however, relates only to accommodation paper. The case was submitted to a jury, as far as it relates to Texada. There was a verdict against him for one thousand dollars. The case was tried by the court as to Bryce, and judgment was given against him for the same sum. Texada made an unsuccessful effort to obtain a new trial. Judgment was given against him on the verdict, and he has appealed.

It is contended, on the part of the appellant, Texada, that he endorsed Compton's note as an accommodation endorser, for the sole purpose of enabling it to be discounted in bank; and that this

was to the knowledge of Martin and the plaintiff, when they acquired the note. There is no evidence of the intention of Texada, to confine the use of his endorsement to the sole purpose of the negotiation of the note in bank. The sole evidence of his being an accommodation endorser, results from the declaration of Bryce, that when the note was brought to him by the maker for his endorsement, that of Texada was already on it. This declaration proves two facts, to wit: the endorsement of Texada, and that, notwithstanding that endorsement, the maker still retained the possession of the paper and the control of the note, which he could not have done, if Texada had been the real owner of the note before he endorsed it. But this proves nothing but the simple character of the endorsement, and not that it had the character which the appellant's counsel seeks to affix thereto, to wit, that of a qualified endorsement, not intended for general use in the market, and which could not be diverted from the use which the counsel suggests, of a discount at the office of the bank. Of this qualification, there is not the least tittle of evidence, much less any of any knowledge, in the persons who afterwards purchased the note, of Texada's intentions of restricting the use that was to be made of it, after he had endorsed it. Texada did not write on the face of the note the words which usually designate an accommodation paper, "*credit the drawer*." Bryce, to whom the maker brought the note for his endorsement, might have fairly discounted it. Nothing in the conversation, which he relates as having taken place between the maker and himself at the time, shows that the latter was not at liberty to reduce the note into cash, in any other manner than by a resort to the bank. Texada may, however, as a surety, in his capacity of an accommodation endorser, avail himself of any plea which his principal might have opposed to the plaintiff's claim, *i. e.* of that of usury. Of this plea, he has had the full benefit, the judgment extending no further than to the sum which actually came into the hands of the maker.

The appellant, Bryce, has given to his endorsement the character of one intended by the parties for the use of the maker, by discount in bank. He has, however, at the request of the plaintiff, by the erasure of the words "*credit the drawer*," manifested

Metoyer v. Trezzini.

his intention of renouncing any advantage which the appearance of these words on the face of the note might authorize him to claim.

Reserving, therefore, the examination of the question, whether the endorsement of an accommodation note, for the purpose of its being discounted in bank, confines the holder to that use, and renders any other unlawful, for the first case, in which the solution of that question may constitute a part of our legitimate duty, we will dismiss it for the present.

Judgment affirmed.

BENJAMIN METOYER V. JEAN BAPTISTE TREZZINI.

An imputation of payment made by a creditor, and subsequently ratified by the debtor, will take effect from its date, though the former may, in the interval, have become the holder of another debt to which the debtor, or one bound as surety for him, might otherwise have required it to be imputed.

APPEAL from the District Court of Natchitoches, *Boyce, J.*

GARLAND, J. Trezzini held a note for \$2000, drawn by Louis Rueg, which was endorsed by the plaintiff and another party, as accommodation endorsers. Trezzini endorsed the note, and had it discounted in the Union Bank, for his benefit. It was protested at maturity for non-payment, and a suit was instituted and judgment recovered against the drawer and all the endorsers. This judgment Trezzini paid, and being subrogated by the bank to all its rights and privileges, he issued an execution, which was levied on the property of the plaintiff. The latter obtained an injunction, on the ground, that Rueg, the drawer of the note, had paid various sums to Trezzini, which ought to be imputed to this debt, to an amount sufficient to discharge it. To this Trezzini answered, that he had received various sums from Rueg; but that at the time of their receipt, he was not the owner of the judgment in question, it being still owned by the bank, and that he had other claims against Rueg, to which those sums had been imputed.

The judgment in favor of the bank was transferred to Trezzini,

Metoyer v. Trezzini.

on the 10th of November, 1842. He had a note of Rueg's for \$518 62, due the 1st—4th of April, 1839. He also had another note of the same person, for \$4000, due the 30th of April, 1839, which had been discounted by the Union Bank also, but being protested for non-payment, Trezzini had taken it up. A further sum of \$139 25 is claimed, as being due on the 25th March, 1841. The receipt to Trezzini on the note of \$4000 is not dated; but the counsel urge, that we can infer the date from an endorsement of the number of days for which interest was calculated, which would make the date the 20th of February, 1841. But this inference is rebutted by the fact of a payment being made on it, on the 1st of April, 1841.

On the 24th of December, 1840, Rueg paid Trezzini \$900, which it appears by an endorsement on the note for \$4000, was paid to the bank. On the 25th of March, 1841, Trezzini received \$600, the price of a slave. On the 1st of April, 1841, he received \$1246 from judgments against Kirkland and Sanglier, &c. From a statement made by Trezzini, which is somewhat confused, and on its face contains some errors, he appears, on the 9th of December, 1841, to have imputed the balance in his hands to the note for \$4000, which, by a document dated April 10th, 1843, Rueg ratified. Rueg was examined as a witness, and stated, that he signed the paper with an agreement, that any errors in it should be corrected, which reservation we understand to apply to the calculations, and not to the imputation of the sums paid.

It further appears, that the sum of \$1246, collected of Kirkland and Sanglier, by Trezzini, was under a power of attorney from Louis Rueg, as the heir and attorney of the absent heirs of Henry Rueg, deceased; and also, that all the notes held by Trezzini were in renewal of notes which Henry Rueg and Louis Rueg had previously given. Of this sum, the District Judge imputed \$139 25 to two small claims, which were the individual debts of Louis Rueg; but for the remainder, he refused to impute it to the note for \$4000, although Trezzini had long previously so imputed it, and Louis Rueg had ratified it, subsequently to the institution of this suit. The imputation made by Trezzini was on the 9th of December, 1841, as appears by his account received

as evidence ; and no complaint was made of it, until about the time of this suit being commenced. In fact, there is nothing in the record which shows that Rueg, the principal debtor on all the notes, ever did complain of it.

The District Judge decided, that because the sum of \$1106 96, part of the \$1246, was received by Trezzini in right of the succession of Henry Rueg, he held it in a different capacity, and could not impute it to Louis Rueg's debt, although he was the sole heir of Henry in the country, and attorney of the absent heirs. But no absent heirs are shown to exist. He, therefore, decided, that the surety, or accommodation endorser of Louis Rueg, had the right of opposing to the creditor all the exceptions which the principal debtor could, which are inherent to the debt ; (Civil Code, art. 3029) ; and, consequently, allowed him the right of imputing the \$1106 96 to the judgment now enjoined, although about a year and a half had elapsed from the time Trezzini received the money, up to the time of his being subrogated to the judgment now enjoined.

The defendant appealed from this judgment.

We are of opinion that the District Judge erred. In the first place, he involves himself in a contradiction, by permitting Trezzini to impute \$139 25 of the sum collected in the right of Henry Rueg's estate, to two items admitted to be Louis Rueg's debt, and by refusing to sanction the imputation of the balance of the sum to a note proved by Louis Rueg, to have been given in renewal of one due by Henry Rueg and himself.

The Judge further states, that if Louis Rueg had sued Trezzini for the amount collected for Henry Rueg's estate, he (Trezzini,) could not have pleaded a note of Louis in compensation. We are of a different opinion. Louis Rueg, so far as the record shows, is the only heir of Henry in the country ; he is also the attorney of the absent heirs, if any exist, and can receive the whole amount of the estate, previous to the appearance and recognition of such heirs. The succession is not shown to be insolvent, or to have been accepted with the benefit of an inventory. Trezzini did not hold the money as a depositary, or in any other fiduciary capacity, except as the agent of Louis Rueg ; and we think compensation might have been opposed to him, at least so far as his in-

Lambeth and another v. Vawter and others.

terest in the succession existed. Pothier, *Traité des Obligations*, vol. 2, No. 588, puts a case in which compensation may be opposed by a legatee, against the debt owing to the heir of the succession individually. Toullier, vol 7, No. 380, advances the same doctrine, where there is but one heir to the succession, and it is not accepted with the benefit of inventory.

Our views in relation to the legality of the imputation made by Trezzini, are strengthened by the knowledge which he and Louis Rueg had of the notes for \$4000 and \$518 62, being given in renewal of notes for which Henry Rueg's estate was bound—by the lapse of time from the date of the imputation to the time any complaint was made of it, and by the subsequent ratification of it by Louis Rueg. We are not prepared to say, that if no imputation had been made previous to the injunction being obtained, we would permit it afterwards, to the prejudice of the surety; but having been made long previous by the creditor, we see no reason why the debtor may not ratify it subsequently, which Louis Rueg did by his receipt of the 10th of April, 1843.

The judgment of the District Court is, therefore, annulled and reversed; and it is ordered and decreed, that the injunction issued herein be dissolved, and that the defendant proceed with his execution; the plaintiff Metoyer paying one hundred and fifty dollars damages, and the costs in both courts.

Sherburne and J. B. Smith, for the plaintiff.

Rothrock and Tuomey, for the appellant.

WILLIAM M. LAMBETH and another v. DAVID VAWTER and others.

Where the Clerk has neglected to deliver copies of the petition and citation of appeal to the Sheriff, to be served as required by art. 581 of the Code of Practice, on parties, residents of the parish, who were made appellees in the petition, further time will be allowed to have them cited.

The members of a private association, formed for the purchase of steamers, and the transporting of passengers and merchandize for hire, are commercial partners; and

Lambeth and another v. Vawter and others.

where the partnership has been dissolved, they may be sued for a debt due by the association individually, or a part of them only, without joining the rest.

Commercial partners are bound, *in solido*, for the debts of the partnership towards third persons. Their responsibility is not limited to the interest they may have in the concern, though the extent of such interest was known to the party with whom the contract was made.

Where the members of a private association, formed for commercial purposes, have agreed that the affairs of the partnership shall be conducted by a president and directors, who are actually chosen, no individual partner can bind the firm. By choosing these officers, the partners have selected the administrators of the partnership affairs.

A master of a steamer has no authority to bind the owners farther than for the necessary expenses of the boat.

Admissions made after the dissolution of a partnership, by one who had been a member, are not binding on those who were associated with him.

APPEAL from the District Court of Natchitoches, *Boyce, J.*

GARLAND, J. In the month of October, in the year 1834, a number of individuals in the Parish of Natchitoches, agreed "to constitute themselves into a joint stock company, for the purpose of purchasing and running two steamboats, in the trade," from that place to New Orleans; and they agreed to pay the sums annexed to their names, for the aforesaid purpose. It was further agreed, that the management of the funds and boats should be confided to a president and four directors, to be elected by the votes of the stockholders, each share to be entitled to one vote, and the money subscribed, to be paid in various instalments from the time of the purchase of the boats. The defendants became subscribers to this company or association, and affixed to their respective names the sums for which they desired to become interested. Vawter subscribed for \$6000; Lecompte for \$500; Prudhomme for \$100; Buard for \$200; and others for various sums. An election for president and directors was held, when Airey was chosen president, and Hopkins, Bossier, Cortes, and Vail, directors. These individuals signed a document, or power of attorney, in which they state, that an association had been formed by various merchants and planters, who had organized themselves under the style of the Natchitoches Steamboat Company, "for the purpose of convenience and facility in navigation." They state that stock, to the amount of \$24,000, has already been subscribed, to be applied to the purchase of one or two substan-

Lambeth and another v. Vawter and others.

tial and suitable boats for the trade. They then recite, that they have been elected President and Directors of the Company, and that they "duly authorize and Empower, Captain David Vawter to proceed to New Orleans, for the purpose of selecting, purchasing, and negotiating the payments for such steamboats as he may approve. We also, in behalf of the stockholders, obligate to fulfil and fully guarantee contracts made by Captain David Vawter, in the purchase of said boat or boats." With this authorization, a copy of the agreement of the stockholders, with their names, and the sums affixed to each, and letters to various commercial houses, Vawter proceeded to New Orleans, where he entered into the following agreement with the plaintiffs. "Under a power of attorney from the President and Directors of the Natchitoches Steamboat Company, and acting in virtue of said instrument, I hereby bind said Company to Messrs. Lambeth & Thompson, a commission of two and a half per cent., on their acceptance of the drafts drawn by the said Company on them, by me, as their constituted agent, at four, eight, and twelve months, viz: New Orleans, 24th November, 1834, at 4 months, favor C. S. Crane \$5356 93; do., 8 months, C. S. Crane \$5557 87; do., 12 do., \$5775 84—\$16,690 64, making sixteen thousand, six hundred and ninety dollars sixty-four cents, which payments the said Company are bound to meet at maturity, or before. Should the said Lambeth & Thompson have to come under a cash advance for said Company, in taking up said paper, they will be entitled to a further commission of two and a half per cent on the amount so advanced by them. Hereby agreeing to pay them the usual commission as agents of boat or boats while running. New Orleans, Dec. 2d, 1834. David Vawter, agent for Natchitoches Steamboat Company." The drafts mentioned in the foregoing agreement, were applied to the purchase of a steamboat called the Ouachita. In the month of January following, Vawter purchased another steamboat called the Romeo, to pay for which he drew drafts to the amount of \$8000, on the plaintiffs, which he signed as the agent of the Company, which were accepted. He also continued to draw drafts for large amounts, as the agent of the Company, on the plaintiffs, up to the month of August, 1835, without having

Lambeth and another v. Vawter and others.

any written authority other than what has been stated, nor any verbal power, so far as the record presents the case to us.

This suit is brought to recover the balance of an account for \$6860 96, the items of which consist of the bills or drafts mentioned in the agreement, and others drawn since ; of charges for commissions, for acceptances, and advances ; of cash paid, of interest at the rate of ten per cent on the various sums, and of other charges, to a very large amount. The credit side of the account shows large payments, amounting to much more than the drafts given in payment for the steamboats Ouachita and Romeo, and the only one drawn by the President of the Company.

The defendants pleaded the general issue. They denied the authority of Vawter to draw the drafts, or to incur the expenses charged against them, also the right of the President and Directors to delegate any such authority to Vawter. They allege further, that they are not bound beyond the amount of their respective subscriptions ; and, finally, plead the prescription of one, three, and five years.

The inferior court, after hearing the parties, was of opinion that the plaintiffs had satisfactorily established their account, but held that the defendants were not responsible as commercial partners, but as joint obligors, or to use the language of the Judge, that " they are only bound to the plaintiffs in the proportion for which they subscribed, and as the whole stock of \$24,000 is to the debt of the plaintiffs, so is the responsibility of each subscriber for the sum annexed to his name ;" and he gave a judgment accordingly, from which the plaintiffs have appealed.

In this court, the defendants Vawter and Cortes pray, that the appeal as to them may be dismissed, on the ground, that they have not been cited ; and the defendants Prudhomme, Lecompte, Buard and Vail, also move to dismiss it, on the ground, that the appellants have not brought into this court all the defendants against whom they obtained judgments.

As to the motion of Vawter and Cortes, it cannot prevail. They were made appellees in the petition of appeal, which petition was filed with the Clerk, whose duty it was, under art. 581 of the Code of Practice, to deliver a copy thereof, with a citation to the Sheriff of the parish, to be served on the appellees. It is not shown that

Lambeth and another v. Vawter and others.

the appellants prevented the Clerk from doing his duty. The appeal has been recently taken, and we think as to these appellees, further time ought to be allowed to have them cited. If the appellees were residents of a parish different from that in which the suit was pending, it might probably be the duty of the appellants to furnish the Clerk the necessary means to forward the petition and citation, but it is not necessary to decide that at present.

The ground of dismissal urged by Prudhomme and others, involves the question in what way the partners are bound, whether, *in solido*, or as joint obligors. If the subscribers to the Natchitoches Steamboat Company are only bound for the sums respectively subscribed, they are joint obligors, or partners, *in commendam*; if they are responsible as commercial partners, they are bound, *in solido*; and any, or all of them, may be sued for the debts of the firm, and it is no more necessary to make them all parties to the appeal, than to the original suit, it being shown that the partnership is dissolved.

The Civil Code, art. 2796, says, that commercial partnerships are such as are formed, among other purposes, "for carrying personal property for hire, in ships, or other vessels." By reference to the agreement subscribed by the parties, this appears to have been the sole object of their association. In 17 La. 85, we said, that the owners of a steamboat, transporting passengers and carrying merchandize for hire, are commercial partners, and may be sued individually, or a portion of them, for a debt due by the boat, without joining all the parties in the action. 8 Mart. N. S. 390; 4 La. 50, 107. These authorities appear to us conclusive; but if more are necessary, they can be found in any elementary treatise on partnership, and in the decision of this court in 4 La. 140, where it was held, that if a party shares in the profits of a partnership, he is responsible for its debts, although his name be not in the firm. Gow on Partnership, p. 15, 16, ed. 1830. But it is stated by the District Judge, that as Vawter, when he applied to the plaintiffs to accept the drafts, and showed them his power of attorney, also exhibited to them the articles of association, the list of subscribers, and the sums subscribed by each, they knew how much each party put into the concern, and that

consequently, as to them, the defendants are bound for no more ; and he relies upon Gow on Partnership, (p. 163—4 ed. 1830,) who says, very correctly, "that if a person with whom a single partner deals, is, at the time, conscious of the misconduct of that partner in pledging the joint name to a separate transaction, he cannot enforce against the firm any claim that may arise to him out of such dealings. Nor can he call upon the firm to fulfil a contract which has been made by one partner, if he be privy to a private agreement between the partners themselves, the effect of which is to throw the responsibility upon the single partner alone." We are unable to see what application these principles have to this case. Vawter was not pledging the Company for a separate or private transaction of his own, nor were the plaintiffs privy to any agreement, nor did there exist any such, by which the responsibility was to be thrown on one or more of the partners. When the plaintiffs saw the agreement or subscription, knowing, as we are to presume that they did, what the law is, they knew that the parties were commercial partners, and therefore bound, *in solido*, for the contracts of the Company. The responsibility of commercial partners towards third persons, is not limited by the interest they may respectively have in the capital stock of the concern. It often happens, that their interest is unequal ; and it is well known, and cannot be doubted, that all are bound, *in solido*, for the debts of the firm to third persons. We are, therefore, of opinion, that, as to the last named defendants, the appeal ought not to be dismissed. 13 La. 303, 281.

The court below was of opinion, that the authority of Vawter to draw the drafts annexed to the account was sufficiently shown, or subsequently ratified by the President and Directors of the Company ; that the charges for interest were usual, and had been paid ; and that the commissions were sanctioned by the agreement made in December, 1834 ; and finally, that the account was sufficiently established. We are of a different opinion. The power of attorney given to Vawter, only gave him authority to purchase one or more steamboats, and to negotiate for the payment for them. Under it, we think he had a right to draw the drafts mentioned in the agreement to pay for the Ouachita, and the two for \$4,000 each, to secure the price of the Romeo. No authority is shown

by the parol evidence, that authorized Vawter to draw drafts on the plaintiffs, in the name of the Company. The fact of his being the master of one of the boats, and having acted as the general agent of the Company, conferred no such authority. The plaintiffs gave no notice to the Company of the acceptance made of Vawter's drafts, except the three first; and late in the summer of 1835, we find the President asking for an account current, and saying that Vawter had received money from them, which the Company knew nothing about. Vawter, as a partner, was not authorized to bind the firm, as it was agreed that a President and Directors should be elected, and they were actually chosen. By choosing these officers, the partners had selected the administrators of the partnership affairs, and given them power to act for them. They had a right to employ necessary agents and servants to transact the business; but to draw drafts and bills required a special authority. He was neither President or Director. As master of the boat, he had no right to bind the Company, any further than for necessary expenses; and it is not shown that the drafts were drawn for such purposes, except one for \$1223 35. As further evidence of the idea of the Company as to the authority to draw bills and drafts, we find that the President had to obtain the authority of the Directors, to draw the only bill signed by him. We are of opinion that neither as agent, partner, or master of the steamboat, had Vawter any right to draw the bills and drafts annexed to the account, except those given in payment for the steamboats Ouachita and Romeo, and the draft in favor of Salter & Marcy, for \$1223 35; and we think the plaintiffs cannot recover on them, unless they can show that the President and Directors subsequently ratified the acts of Vawter, whilst they were authorized to act as such, or that the defendants, since the dissolution of the partnership, have done so, or that the proceeds of the drafts enured to the benefit of the Company.

The plaintiffs' counsel contend, that the depositions of Harding, their clerk, with the testimony of Airey, Cockerille, and Ogden, sufficiently prove the account. We think not. Cockerille seems to know nothing about the correctness of the account. It is true that Harding swears to its correctness; but we consider his testimony as entitled to no weight, as it appears that he was

Lambeth and another v. Vawter and others.

not in the employment of the plaintiffs at the time the drafts were drawn, nor even in the country. It is clear, that he swears to what he found in the books of the plaintiffs, without any personal knowledge of their correctness. The books are no evidence against the defendants, and the deposition of Harding can have no effect against them.

The testimony of Airey relates to the agency of Vawter, which he proves only to have been a general one. He also made various admissions to Ogden, of a very vague and general character, in relation to the account, not sufficient, we think to sustain it. Ogden's testimony consists entirely of the admissions made by Airey, the former President of the Company, which the latter admits to be true. But all these admissions were made after the dissolution of the Company by the destruction of one of their steamboats, and the sale of the other. Civil Code, art. 2847. His admissions are, therefore, not binding on the defendants. 6 La. 683; 8 La. 568; 4 La. 32; 5 Mart. N. S. 324.

As to the charges of interest at the rate of ten per cent per annum, they are not sanctioned by law, as there is no written agreement to pay interest at that rate; nor are the plaintiffs entitled to charge two and a half per cent for cash advances, except on such as may have been made on the three drafts mentioned in the written agreement. The charges of two and a half per cent for accepting the drafts which Vawter was authorized to draw, are correct, and those for commissions as agents of the steamboats.

It further appears, that one of the drafts charged, is drawn by a person named Daly. It seems that he was a clerk of one of the steamboats; but no authority to him to draw drafts or bills, which will bind the defendants, is shown.

From the credit side of the plaintiffs' account, it appears that a larger amount has been paid them, than that of the items of their account which have been proved; but as it may be in their power to show that the acts of Vawter, in drawing all the drafts were ratified, or that their proceeds enured to the benefit of the Company in which the defendants were partners, we think justice requires, that we should only give a judgment of nonsuit against the plaintiffs.

The judgment of the District Court is, therefore, annulled and

J. F. C. v. M. E., His Wife.

reversed, and a judgment of nonsuit given against the plaintiffs, with costs in both courts.

Brent and O. N. Ogden, for the appellants.

Sherburne, Dunbar, Hyams and Elgee, for the defendants.

J. F. C. v. M. E., His Wife.

A reconciliation between a husband and wife, after the facts which might have authorized a suit for separation, is a bar to such an action. C. C. 149. Nor can this provision be evaded by praying for a divorce, or a separation *a mensa et thoro*, by way of reconvention. To succeed in such a demand, sufficient legal cause for a separation must be shown to have occurred since the reconciliation.

A wife, proved to have been guilty of adultery, cannot claim, on her part, a divorce from her husband, on account of his having killed the man with whom the act was committed. The provision of the act of 2 April, 1832, sect. 1, which declares "that whenever a husband or wife charged with an infamous offence, shall actually have fled from justice and gone beyond the jurisdiction of the State, the husband or wife of such fugitive may claim a divorce, on producing proof to the Judge who tries the petition for divorce, that his or her husband or wife has actually been guilty of such infamous offence, and has so fled from justice," never contemplated such a case.

A husband who obtained a divorce on account of adultery on the part of his wife, entrusted with the custody of the issue of the marriage.

APPEAL from the District Court of Natchitoches, *King, J.* This was an action for a divorce by the husband, on the ground of adultery, the plaintiff praying for the custody of the issue of the marriage. The defendant denied the charge of adultery. She alleged that the plaintiff had, for many years, treated her with great cruelty and brutality; that he had grossly defamed her; that he had been long addicted to intemperate drinking; that he was of a jealous and suspicious temper, and had rendered her life insupportable. She charged him with having contrived himself the circumstances alleged as proof of her guilt; and prayed for a divorce, on her part, on those grounds, and because the plaintiff had murdered the person whom he had falsely accused of improper intimacy with her. She also asked for the provisional custody of her child, the only issue of the marriage.

The case was tried by a jury, who found "a verdict for the de-

feudant, separating her from bed and board," and entrusting her with the custody of the child. A new trial having been refused, and judgment rendered in accordance with the verdict, the plaintiff appealed.

Sherburne and *P. A. Morse*, for the appellant. The grounds for a separation from bed and board were extinguished by the reconciliation of the parties, (Civil Code, arts. 149, 150,) no new cause having subsequently arisen. The defendant cannot avail herself of the alleged murder of her paramour, to obtain a divorce. See a remarkable case, in Favard, *Répertoire de la Legislation Moderne, verbo* Separation entre Epoux, sect. 2, § 2, art. 2, No. 6. As to the sufficiency of the evidence of the wife's guilt, see Favard, *verbo* Adultère, § 11. Merlin, *verbo* Adultère, No. xix. *Ib. verbo* Indices, No. 3, 5. 2 Starkie, 253, note 1.

J. Taylor, Dunbar, Hyams, and Elgee, for the defendant. The evidence does not establish the charge of adultery, and so the jury found. In 10 La. 250, the court held, that circumstances, though extremely suspicious, will not suffice; nor will any admission of the parties. 16 La. 26. The judgment of the lower court should be so amended as to grant the defendant a divorce *a vinculo matrimonii*, instead of a separation *a mensa et thoro*, but should be, in other respects, affirmed.

BULLARD, J. This is a suit for a divorce, grounded on the charge of adultery by the wife, alleged to have been committed on the 10th and 11th of February, 1842, with J. M. G. The plaintiff claims, at the same time, the custody of their child E., issue of the marriage.

The defendant denies the adultery, and claims, in reconvention, a divorce from the plaintiff, on the allegation of great and repeated and brutal outrages, for a series of years, which embittered her existence, and rendered her life insupportable. She further alleges, that she is entitled to a divorce, because the plaintiff had killed the said J. M. G., and thereby committed an infamous crime, and had fled from justice.

The cause was tried by a jury; a verdict and judgment were rendered for the defendant, decreeing her a separation from bed and board, and the plaintiff has appealed.

It is shown, that the parties lived unhappily together; that the

husband was, on many occasions, guilty of cruel treatment towards his wife, and that her conduct was ladylike, and above reproach. Repeated quarrels led at last to a voluntary separation, in the spring of 1841, when she returned to her father's house. Soon after the separation, the plaintiff solicited a reconciliation by letter, expressing his deep contrition for the past, confessing his wrongs towards his wife, and assuring her, in the most earnest manner, that he was an altered man. This letter being without effect, he solicited the interposition of friends. Finally, on the 20th of October, a second letter was written by the plaintiff, repeating his sorrow for the past, and earnestly supplicating his wife to be reconciled to him. Early in November following, a reconciliation did take place, and the defendant returned to her husband's house. From that period up to the fatal occurrence of the 10th of February, 1842, there is no evidence that the parties lived unhappily, or that the husband was guilty of any cruelty or outrage towards the defendant.

If, under these circumstances, the defendant had brought a direct action for separation from bed and board grounded upon alleged cruelty and outrage, previously to the month of November, 1841, the reconciliation which then took place, would have been an insuperable bar to her action, unless on proof of renewed ill treatment after the reconciliation. The provision of the code on this subject is explicit and formal. "The action of separation shall be extinguished by the reconciliation of the parties, either after the facts which might have given ground to such action, or after the action has been commenced. In either case, the plaintiff shall be precluded from bringing his action; but he shall be at liberty to bring a new suit for causes arising since the reconciliation, and therein make use of the former motives, to corroborate his new action." Civil Code, arts. 149, 150.

The defendant cannot, in our opinion, by asking either for a divorce, or a separation from bed and board, by way of reconvention, evade that provision of law; and, in order to succeed in such a demand, sufficient legal causes or a separation must be shown to have occurred since the reconciliation.

As to the charge of adultery, the evidence in the record has engaged our serious and attentive consideration. All the circum-

Vol. VI. 18

stances taken together, leave no ground for reasonable doubt, that the defendant and G. were surprised by the husband in his own house, in *flagranti delicto*. We do not consider it our duty to give any analysis of the evidence ; suffice it to say, that there is not the slightest proof in support of the allegation of the defendant, that G., who, she admits, was in the house at the time alleged, came there by the contrivance of the plaintiff himself. All the circumstances proved upon the trial repel such a charge.

But it has been urged upon us with great earnestness, that the plaintiff having afterwards killed G. and fled from justice, and gone beyond the jurisdiction of the State, was guilty of 'an infamous offence, and that the wife, for that cause, is entitled to a divorce. Bullard & Curry's Digest, *verbo* Divorce.

We cannot give our sanction to such an application of the law. Having expressed our conviction, that the charge of adultery is made out—although it is shown, that the plaintiff took his revenge afterwards by slaying G. in cold blood, and in a manner both cruel and unmanly ; yet we are not prepared to say, that the wife, whose conduct had already entitled the husband to a divorce, may turn round and claim a divorce on her part, on account of the killing of the man, with whom the act had been committed. The Legislature never could have contemplated such a case.

For these reasons, we have come to the conclusion, that the judgment below is erroneous ; and it becomes our duty to reverse it.

It is, therefore, ordered, that the judgment of the District Court be avoided and reversed, and the verdict set aside ; and it is further ordered and decreed, that the bonds of marriage heretofore existing between the plaintiff and M. E., his wife, be, and the same are, hereby, declared to be forever dissolved ; and it is further ordered, that the plaintiff be maintained in his rights to the custody of the child E., issue of the marriage, and that the defendant pay the costs of both courts.

Metoyer v. Larenandière.

BENJAMIN METOYER v. MAXIMILIEN LARENANDIÈRE.

The survey of a claim to a portion of the public lands, and its approval by the Surveyor General, are not conclusive upon the government of the United States. Until a patent is issued the title is still in the government, unless it be where the claim has precise and specific boundaries, and has been confirmed by an act of Congress, which, in such a case, is equivalent to a patent.

It is within the discretion of the court, after the trial has commenced, to continue the case for the admission of further evidence.

The evidence of a single witness is sufficient to prove permission to a third person to settle upon land belonging to a party.

No one can be permitted to change the character of his own possession; nor can a tenant acquire a title adverse to his landlord's, and continue to possess for himself.

Parol evidence is inadmissible to prove that plaintiff was the owner of the land in dispute, and leased it to the defendant, and that the latter committed a fraud in converting it to his possession. It would tend to make out a title to real estate by parol.

APPEAL from the District Court of Natchitoches, *King, J.*
Dunbar, Hyams and Elgee, for the appellant.
Brent and O. N. Ogden, for the defendant.

BULLARD, J. The plaintiff asserts title to a tract of land, situated on the left bank of that branch of Red River, now called Old River, and formerly *Rivière de Mad^{me} Gaspard*, containing six hundred and forty acres, which was confirmed to one John Lassave, and which now belongs to the plaintiff, by a regular chain of conveyances. He alleges, that one Maximilien Larenandière, has taken possession of the same; and that Larenandière, knowing the rights of the petitioner, still retains possession, sets up title, and refuses to deliver it up to the petitioner.

The defendant answered by a general denial. There was a verdict and judgment for him, and the plaintiff has appealed.

The plaintiff gave in evidence, as proof of title, a copy of the notice of Lassave, before the Register and Receiver of his claim, in which he claims six hundred and forty acres of land, which he describes as situated on the left bank of that branch of Red River called *Madame Gaspard's*, founded on a residence of sixteen years. In another extract from the proceedings before the Land Com-

missioners, it is described as a claim for six hundred and forty acres of land, on the left bank of the bayou Courant. This claim is certified to have been confirmed by act of Congress in 1825; and it is under this confirmation, that the plaintiff, by an amended petition, claims to hold. In the sale from Lassave to Dubois, the plaintiff's immediate vendor, the land is described as situated on the left bank of the river, called *Rivière de Madame Gaspard, au bayou Courant*.

A location of the claim is shown, approved by the Surveyor General, on the left bank of Old River, or the *Rivière de Madame Gaspard*, and a mile or two distant from its junction with the bayou Courant, which empties itself from the opposite side of the river.

Thus it appears, that the calls of the plaintiff's title are vague, if not contradictory.

On the other hand, the defendant exhibits, as evidence of his title, a patent from the United States dated in 1839, for one hundred and twenty-three acres and a fraction, which it is shown are embraced within the limits of the plaintiff's claim, as located by the surveying department, and cover the improvement made by the defendant himself.

There is no evidence that Lassave made any improvement, or that he ever lived upon any part of the land as located. On the contrary, the existence of such a man is denied; and there is no evidence of any settlement made by him, or even of his existence, except the *ex parte* testimony of one person, taken before the Land Commissioners.

Under these circumstances we are of opinion, that the title of the patentee must prevail. The survey of the claim and its approval by the Surveyor General, were not conclusive upon the government. Until a patent issue, the title is still in the government, unless it be when the claim has precise and specific boundaries, and has been confirmed by an act of Congress, which in such a case may be equivalent to a patent. Nothing prevented the government from selling to the defendant part of the land, not necessarily embraced within the plaintiff's claim. We cannot distinguish the case from that of *Lefevre v. Comeau*, 11 La. 321. The same doctrine was recognized by us in the case of *Slack v.*

Orillion, 13 La. 56, and in *Lott et al. v. Prudhomme et al.*, 3 Robinson, 293.

The plaintiff and appellant relies for a reversal of the judgment and a new trial, upon a bill of exceptions, from which it appears, that during the trial, and before the evidence was closed, the plaintiff's counsel presented two affidavits, the substance of which was, that one Breville, as the plaintiff had learned that morning, was a material witness for him; that he was present when the plaintiff gave permission to the defendant Larenandière to remain upon the land in controversy; and that the plaintiff expected to obtain the attendance of the witness in three or four hours; whereupon he moved the court to admit the witness to be sworn, although the argument may have been begun on the arrival of the witness; that the court said it would be time to decide on that question when the witness should have arrived; that the cause was then opened by the plaintiff's counsel, and the court adjourned for dinner until 3 o'clock, and when the court met in the afternoon the witness appeared and was offered; and that the court refused to permit him to be sworn. The reason given by the Judge was, that the same fact which he was offered to prove was already established by the testimony of Augustin Metoyer. The court did not err. It was within the discretion of the court at that stage of the trial, to admit or reject other evidence. The reason given was, in our opinion, sufficient. Augustin Metoyer had already testified, that the plaintiff had permitted Larenandière to settle upon his land. Such a fact was sufficiently established by a single witness. But, in our opinion, the evidence is entitled to very little weight in a case like the present. It is true, no man can be permitted to change the character of his own possession; and a tenant cannot acquire a title adverse to his landlord, and continue to possess for himself. This doctrine is admitted. But Larenandière settled on the land, long before any location of the land had been made by the surveying department, and when the plaintiff, according to the written evidence, had no title to the spot where he had made his improvement. Parol evidence in such a case, if admissible, would destroy a written title of the highest dignity. The principle contended for applies when, the lessor's title is known and acknowledged, and there is a lease. The pos-

 Hill and others v. Barlow and others.

session of the lessee, is then that of the lessor. But it is not shown, that the plaintiff was the owner of the land afterwards purchased by the defendant of the government. The original calls of Lassave's claim did not embrace it, and the location by the surveying department had not then been made. Such evidence would tend to make out title by parol; and it is entitled to no weight in this cause, unless it shows, that Metoyer was the owner, and that he leased the land to Larenandière, and that the latter committed a fraud in converting the possession, which he held for the owner, into the means of acquiring one for himself. The evidence did not satisfy the jury that such was the case, and it has failed to satisfy us. We concur with the jury and the court below, that the defendant has shown the best title to the land covered by his patent.

Judgment affirmed.

HORACE B. HILL and others v. NOAH BARLOW and others.

Prescription is interrupted by a citation to the party in whose favor it is running, to appear before a court of justice on account of the right or claim to which the prescription would apply. This is called a legal interruption, and it matters not whether the suit be before a court of competent jurisdiction, or not. C. C. 3482, 3484, 3516. The party must be cited. No other means of knowledge of the proceedings instituted against him, though brought home to him, will suffice to operate a legal interruption.

Acceptance of service of citation by a curator *ad hoc* appointed to represent an absent defendant, will not interrupt prescription as to the latter. Art. 177 of the Code of Practice which provides for the waiver, or acknowledgment of service, in writing, under the signature of the defendant or his attorney, on the back of the original petition, does not apply to a curator *ad hoc*. Such waiver or acknowledgment can only be made by the defendant personally, or by the attorney whom he has employed.

Service of a petition and citation upon a curator *ad hoc*, amounts to a notification of his appointment. The process must be regularly served, and until then he has no capacity to act, nor can he waive any of the legal proceedings required for the protection of the rights of the absentee he is called upon to defend.

Every law empowering our courts to decide upon the rights of absentees must be strictly construed, and the formalities prescribed exactly followed.

Hill and others v. Barlow and others.

Where things to be done are not merely acts of administration, or such as facilitate such acts, the power must be express and special. Civil Code, 2296.

The exercise of the right of claiming prescription is an act of ownership; and its abandonment is one of alienation, which no agent can exercise, so as to deprive his principal of his right to claim it, without special authority from the latter.

An attorney at law cannot acknowledge a debt, so as to bind his client.

The powers of a curator *ad hoc* must be strictly limited to those conferred by law. They cannot be extended to the performance of any other acts than such as tend to the defence of the rights and interests of the absentee whom he represents. He cannot waive, prospectively, on behalf of his client, the production of legal evidence; nor bind him by agreeing to dispense with the forms of law in taking it. He cannot surrender any lawful means of defence, to the injury of those he represents.

Where the petition alleged that an act of mortgage was intended by both mortgagors and mortgagees to secure to the latter an unjust and illegal preference, plaintiffs will be estopped from averring that the mortgage was unknown to the mortgagees, and not accepted by them.

A mortgage in favor of an absentee, executed and registered by the mortgagor, has its legal effect though not accepted by the mortgagees.

No contract between a debtor and one of his creditors, for the purpose of securing a just debt, though the debtor were insolvent to the knowledge of the creditor, and although the other creditors be injured thereby, can be annulled after one year, reckoning from its date to the time of bringing the suit to avoid it. C. C. 1982.

APPEAL from the District Court of Madison, *Curry, J.*

Stockton, for the appellants. The prescription of one year was not completed when service of citation was accepted by the curator *ad hoc*, appointed to represent the bank. This acceptance was as good as actual service by the Sheriff. 4 Mart. N. S. 238, 680. 4 La. 257. 12 La. 596. 13 La. 285. But the prescription of one year is inapplicable to this case, the plaintiffs residing out of this State. Civil Code, arts. 3437, 3442, 3443, 3444, 3507, 3508, 3510, 3511. Code of Practice, art. 593. Being an action for the rescission of a contract, and the plaintiffs being non-residents, this action is only prescribed by ten years. Civil Code, art. 3507. In 2 Mart. N. S. 585, is a decision establishing the law in an analogous case. The mortgage is void for want of acceptance. Civil Code, arts. 1758, 1759, 1764, 1773, 3314. 4 La. 80. 6 La. 218. The Commercial Bank of Natchez, being a foreign corporation, had no authority to take a mortgage on property in this State. 16 La. 439. The mortgage is void on account of the insolvency of the mortgagor, to the knowledge of the mortgagees.

Hill and others v. Barlow and others.

Civil Code, arts. 1976, 1977, 1965. 4 Mart. N. S. 651. 8 Ib N. S. 462. 10 La. 363. 14 La. 186. 16 La. 369.

Stacy, for the defendants. The action is prescribed by one year. Civil Code, art. 1982. *Petit v. His Creditors*, 3 La. 28. *Caldwell et al. v. The Atchafalaya Bank*, 14 La. 308. The acceptance of service of citation by the curator *ad hoc*, appointed to represent the Bank, was illegal, and did not interrupt the prescription. Civil Code, art. 57. 5 Mart. N. S. 307, 310. 6 Ib. N. S. 130. 10 Mart. 475. 7 La. 268. 3 La. 203. 17 La. 116. Art. 177 of the Code of Practice applies only to the defendant, or the attorney *employed by him*; not to a curator, *ad hoc*, representing an absentee, who can neither waive nor admit any thing by which the rights of the party he represents may be injuriously affected. Code of Practice, arts. 194, 195, 196. *Stockton et al. v. Halsuck et al.*, 10 Mart. 472. 4 Mart. N. S. 238.

SIMON, J. Several creditors of the defendant, Barlow, have joined in this action, for the purpose of annulling a mortgage given by him and his wife to the Commercial Bank of Natchez, to secure the payment of a large sum of money, declared in the act to be due by Barlow to the Bank. This act of mortgage was passed on the 13th of March, 1839, before the Judge of the Parish of Concordia, and was duly recorded in the Parish of Madison, where the property is situated.

The plaintiffs complain, that Noah Barlow, being, to the knowledge of the Commercial Bank, in insolvent circumstances at the time that the mortgage was executed, consented to give the said mortgage, with a view to secure to the Bank the payment of a pre-existing debt due by him to the Bank, a long time anterior to the date of the mortgage; that said debtor's insolvency was notorious, and well known to the President, Directors, and Company of the Bank; and that the mortgage was intended by both the mortgagors and mortgagees to secure to the mortgagees an unjust, illegal, and fraudulent preference over the other creditors of the said Barlow, &c.

This suit was instituted on the 12th of March, 1840, against Noah Barlow and his wife only, with a prayer, that as they were absentees, curators *ad hoc* should be appointed to represent them; but the District Judge, by an order signed on the same day on

which the petition was filed, after appointing a curator *ad hoc* to the defendants named in the petition, thought proper to appoint also a curator *ad hoc* to the Commercial Bank of Natchez, ordering that said curators "*be notified thereof by service in due form of law.*" Accordingly, a copy of the petition and citation were served upon the curator *ad hoc*, appointed to Barlow and wife, on the 18th of March, 1840; but the curator *ad hoc*, appointed to the Commercial Bank, thought himself authorized to take notice of his appointment before being served with the necessary proceedings, and acknowledged the service thereof at the foot of the petition, on the 13th of March, 1840, as follows: "I accept service of the above petition, and waive the necessity of citation and copy of the petition as the law requires."

The defendants, Barlow and wife, joined issue by denying all the allegations contained in the plaintiffs' petition, except the execution of the act of mortgage, which they allege was made in good faith, and by pleading prescription. The Commercial Bank of Natchez, first appeared by pleading the general issue, and afterwards filed a peremptory exception founded upon the prescription of one year against the plaintiffs' action, alleging that said prescription had fully accrued against the plaintiffs' action, before any issue joined in this suit, and before any legal notice of said suit was ever served on or given to the Bank, and was never legally interrupted, within the year from the date of the registry of the act sought to be set aside. The first answer of the Bank, was filed on the 26th of November, 1840, and the plea of prescription on the 17th of May, 1841.

After a full investigation of the facts adduced by the parties in support of their respective pretensions, the Judge, *a quo*, rendered judgment in favor of the plaintiffs against Barlow, liquidating the several sums due by him to each of the plaintiffs, by virtue of the several judgments declared upon in the petition; but refused to set aside the act of mortgage complained of, declaring the same to be confirmed and adjudged good and valid. From this judgment, the plaintiffs have appealed.

Several points have been raised by the plaintiffs' counsel, growing out of the evidence in the case, and the law applicable thereto, and he has made strenuous efforts to convince us that this

revocatory action should be maintained, and that the act of mortgage, declared to be good and valid by the lower court, ought to be annulled and set aside ; but from the state of the case, our attention is necessarily first called to the peremptory exception filed by the appellees, founded upon the plea of prescription of one year ; as our opinion upon this point, if favorable to the defendants, will render it unnecessary to examine, or, at least, to express any opinion upon any other of the questions submitted to our consideration.

The appellees' counsel has contended that the curator *ad hoc*, appointed by the court to represent his clients, had no legal right by any *voluntary act*, to waive, abandon, or interrupt the prescription, accruing in favor of the Bank ; that his acceptance of service, or waiver of it, was unauthorized, illegal, and does not bind the Bank, and that the prescription *still* continued to run.

It is, perhaps, proper to remark that, as to the defendants, Barlow and wife, more than one year had elapsed between the date of the act of mortgage complained of, and the service of the citation on the curator *ad hoc*, appointed to represent them. As to them, who are the mortgagors, the prescription had clearly accrued ; and how far such prescription, acquired by one of the parties to the act, can benefit the other party, or preclude the plaintiffs from exercising successfully their revocatory action against both, or maintaining it against one only, is a question which would have been of some importance in this case, had the prescription been legally and unequivocally interrupted as to the mortgagees. As the case stands, however, it will not fall under our examination.

One of the well known rules relative to prescription is, that it becomes interrupted, when the party in favor of whom the time necessary to acquire it is running, *has been cited to appear before a court of justice*, on account of the right or claim to which the prescription would apply. This is called a "legal interruption;" and it matters not whether the suit has been brought before a court of competent jurisdiction, or not. Civil Code, arts. 3482, 3484, and 3516. It is, therefore, necessary that the party *should be cited* ; and it cannot be controverted, that any other means of knowledge of the proceedings instituted against him, brought home to the party against whom the prescription is sought to be legally

interrupted, would not be sufficient to operate as a *legal interruption* in the true sense of the law. Now, in this case, the Commercial Bank having been made a party to the suit by the appointment of a curator *ad hoc*, said curator acknowledged service of the citation without waiting for the issuing of the process, and for its service upon himself according to law; but this was the only act which he ever performed in the name of the absent defendants whom he had been appointed to represent, and it was not until the 26th of November following, that said defendants (the Bank) made a voluntary appearance in the suit, and filed an answer signed by counsel regularly employed to defend it. It is said, however, that the acceptance of service by the curator *ad hoc*, amounts to a legal interruption of the prescription of one year, and is binding upon the Bank.

Art. 57 of the Civil Code provides, that "if a suit be instituted against an absentee who has no known agent in the State, the Judge before whom the suit is pending shall appoint a curator *ad hoc*, to defend the absentee in the suit." The same provision exists in arts. 116 and 964 of the Code of Practice; and the object of the law appears clearly to be, that the interest of the absentee should not be sacrificed in his absence, but that, on the contrary, his rights should be well defended and in the same manner as if he were present. After a curator *ad hoc*, has been appointed to an absent person, the law requires that the petition and citation *should be served* upon him, either by delivery in person, or by leaving them at the usual place of domicile of the curator. Code of Practice, arts. 194, 195. And we are not ready to say that art. 177 of the same code, which provides for the waiver or acknowledgment of service, to be written on the back of the original petition, by the defendant or his attorney, should apply to a curator *ad hoc*; since, from the terms of the law, it seems that such waiver or acknowledgment is only to be made by the defendant *personally*, or by the attorney whom he has employed. The service of the petition upon the curator *ad hoc*, amounts to a notification of his appointment. Until then he has no capacity to act as such; and it appears to us at least irregular, if not wholly illegal, that he should take notice of his appointment, and bring the absentee before the court, by a simple acknowledgment of the service of the citation,

or by a waiver thereof. This is not one of the modes recognized by law, by which an absentee can be called before a court of justice, to answer to a demand made against him by one of our citizens. The process should be regularly served upon the curator appointed to defend him; and it seems to us, that the latter cannot waive any of those legal proceedings which are instituted and required for the protection of the rights of the absentee, whom he is called upon by the court to defend. In 10 Mart. 474, this court held, that every law that permits our courts to decide on the rights of those who are absent, should be strictly construed; and that the formalities which it prescribes in allowing a creditor to pursue his debtor in this way, ought to be exactly followed. If this be correct, and we do not doubt of the correctness of the doctrine, it follows, that the acknowledgment of service made in this case by the curator *ad hoc*, was an illegal act on his part, and that, as such, it cannot prejudice the appellees.

It has been said, however, that the Bank, by the answer filed, recognized its having been made a party to the suit, and entered its appearance in consequence of the waiver, or acknowledgment of service made by the curator. The answer filed on the 26th of November, does not allude in any way to the act of the curator, but only states that the Bank was made a party to the suit. This may also be considered as an allegation made in reference to the order of the Judge; and at any rate, we cannot consider the appearance of the appellee, in any other light than as a voluntary one, and for the purpose of litigating and settling in one and the same suit, the rights which the Bank had acquired, under the act of mortgage, to the property which the plaintiffs were seeking to apply to the satisfaction of their judgments against the original defendants.

But is it true, in supposing that the curator, *ad hoc*, could take notice of his appointment by waiving the service of the petition, that he could legally waive the service of the citation, or acknowledge such service, so as to cause a legal interruption of the prescription which was on the eve of expiring, and of being acquired by his clients? Is it true, that he could thereby renounce one of the most important rights of the party whom he was appointed to defend? This question, in our opinion, must be answered nega-

tively. In matters of agency, the law says, that in general, *where things to be done are not merely acts of administration, or such as facilitate such acts, the power must be express and special.* Civil Code, art. 2966. Prescription is a legal right granted by law for the purpose of acquiring property, or of being liberated from a debt by the lapse of time. The exercise of the right, or its abandonment, is not a mere act of administration. When exercised, it is an act of absolute ownership, used as a title to the property, or as a bar to the action of the creditor; and when waived, it is an act of alienation, which no agent can do so as to have the effect of depriving his principal of the exercise of the right, without special authority from him to do so. So, in 3 La. 203, it is held, that attorneys at law, as such, have not the power of acknowledging a debt; and it is well known, *that the acknowledgment of a debt is one of the modes of interrupting prescription.* Civil Code, art. 2517. The curator *ad hoc*, cannot have a more extensive authority than an attorney at law employed by the party, particularly as the former is often-times unknown to the absentee whom he is appointed to defend. We think, that on the contrary, his powers should be restricted, and strictly limited to those allowed by law, and that they should not be extended to performing any other acts, but those tending to defend the rights and interest of the absentee whom he represents. So, in 13 La. 284, we held, that a curator *ad hoc*, has no capacity or authority to waive, prospectively, in behalf of his client, the production of legal evidence; and that he cannot bind him, by agreeing to dispense with the forms required by law in taking evidence. In 17 La. 117, it was decided, that a person appointed by a court, to defend the rights of absentees in a suit against them, ought not to be permitted to surrender any lawful means of defence on their part, to the injury of those whom he represents. And in this case, we must come to the conclusion, that the curator *ad hoc*, had no authority to waive the service of the citation, and, by his voluntary act, to cause a legal interruption of the prescription set up as a peremptory exception by the appellees.

It has been further urged, that the prescription in this case cannot be taken as having run from the date, or recording of the act of mortgage, because said act has never been accepted by the

Bank ; and that the time should only take effect and be counted from the date of the acceptance, to wit, the filing of the defendant's answer ; as before then, the Bank had never expressed any intention to accept the mortgage. This objection cannot avail the plaintiffs. The allegations of their petition are directed against the act of mortgage, as if it had been duly and regularly accepted at the date of the act by the mortgagees. It is stated therein, that said mortgage *was intended by both mortgagors and mortgagees* to secure to the mortgagees an unjust, illegal, and fraudulent preference, &c. These allegations clearly mean, that the mortgagees participated in the execution of the mortgage ; that they were present when it was so executed ; and that the fraud complained of was committed by both parties to the act. If so, the mortgage must have been accepted ; and it does not lie in the mouth of the plaintiffs to say now, that the act of mortgage was unknown to the Bank, and thereby to gainsay the allegations upon which their action is necessarily based. But however it may be as to the effect of those allegations, we think, that the want of acceptance in this case cannot prejudice the appellees, as it is well settled in our jurisprudence, that a mortgage in favor of an absent person, executed and registered by the mortgagor, (here the mortgagees are absent, and the act was recorded by the mortgagor,) has its legal effect, although not accepted by the mortgagee. 2 La. 552. See also, 2 Mart. N. S. 672, and 3 Ib. N. S. 607.

With this view of the question of prescription, we think, that the peremptory exception filed by the appellees must prevail. The petition contains no other cause of nullity than an undue preference intended to be given by Barlow to the Bank. In such case, the action is prescribed by one year, reckoning from the date of the contract sought to be set aside. Civil Code, art. 1982. 3 La. 28. 14 Ib. 308. We conclude, that the appellees are entitled to the full benefit of the exception, notwithstanding the unauthorized acknowledgment of service of the citation, made in their names by the curator *ad hoc*, who had been appointed by the court to defend them.

Judgment affirmed.

DUNCAN C. GOODWIN and another v. URANIE BURNEY and Husband.

Where plaintiff sues for the amount of an open account, less than three hundred dollars, he cannot give jurisdiction to the Supreme Court by claiming conventional interest from a particular period, where there was no agreement to pay it.

Where the amount really in dispute is under three hundred dollars, the appeal must be dismissed, though at the instance of the party who, by a fictitious claim for interest, attempted to bring the case within the jurisdiction of the Supreme Court.

APPEAL from the District Court of Rapides, *King, J.*

W. B. Hyman, for the plaintiffs.

M. Ryan, for the appellants.

SIMON, J. The plaintiffs and appellees have moved to dismiss this appeal upon two grounds, one of which, we think, must prevail, to wit: that the amount in dispute does not give this court jurisdiction, as the sum, *bona fide* claimed, is less than three hundred dollars.

This suit is brought to recover the sum of \$294 32, stated to be due upon an open, detailed account of goods and merchandize, alleged to have been sold and furnished to the defendants. The account is filed with the petition; but the petition contains a prayer for interest at the rate of ten per cent per annum, from a certain period until paid, without its being shown why and by virtue of what agreement said interest is claimed. There is no allegation that the defendants ever promised in writing, or otherwise, to pay that interest. The interrogatories propounded by the plaintiffs to the defendants to prove the account, make no mention of any contract to pay interest; and it seems to us, that from the face of the record, the prayer for interest cannot be serious, as there was neither proof of the same, nor even any attempt made to establish the claim. It is clear, that the object of the plaintiffs, by adding to their demand a prayer for interest, was to bring this case within our jurisdiction. Indeed, they confess it in their motion to dismiss this appeal.

Although the motion to dismiss is made by the very party, who by a fictitious and imaginary claim for interest tacked upon his real demand, attempted to put this case within our jurisdiction,

in violation of the constitution, we feel bound, in respect to that constitution, to sustain it, and to keep ourselves within the limited powers conferred upon us by the supreme law of the land. But we cannot forbear expressing our great dissatisfaction at the unlawful conduct of a party, who, in order to take advantage of his own wrong, confesses before us, that he has been guilty of having derogated from the respect due to the courts of justice of his country.

In conformity, however, with our former decisions, (16 La. 183, 17 La. 103,) the appellees' motion must prevail.

Appeal dismissed.

ROBERT B. LOTT v. WILLIAM L. GRAY.

The action allowed by the tenth and eleventh sections of the act of 28th March, 1840, abolishing imprisonment for debt, cannot be maintained, unless the unjust advantage, or preference given by the creditor to one of his debtors, or the conveyance, transfer, mortgage, or pledge of his property made by him, shall have had the effect of injuring the complainant. Thus, where the property alleged to have been fraudulently and illegally sold, had been seized under a *fi. fa.* by a third person, who had, under art. 722 of the Code of Practice, by the mere act of seizure, acquired a preference over the other creditors, the plaintiff cannot maintain his action; as the annulling of the sale could only benefit the creditor who had acquired a privilege by his seizure.

APPEAL from the District Court of Rapides, King, J.

M. Ryan, for the appellant.

Brent, and *O. N. Ogden*, for the defendant.

SIMON, J. This action is instituted under the 10th and 11th sections of an act of 28th March, 1840. B. & C's. Dig. p. 474. The allegations of the petition are, that the plaintiff is a judgment creditor of the defendant, in the sum of \$277 75, with interest, which he was prevented from collecting, in consequence of an actual or simulated sale, or fraudulent transfer, made by the defendant, of his cotton to Lambeth & Thompson; that said sale, whether actual or pretended, was made by the defendant, solely with the intention of defrauding, cheating, and swindling his

honest creditors ; and, that even supposing that Lambeth & Thompson were the defendant's creditors, he gave them an undue preference over other creditors, he, the defendant, being in insolvent circumstances. He prays according to the provisions of the said act of 1840.

The answer first denies the allegations contained in the petition, and avers, that all said allegations are false and unfounded. The defendant further avers that this proceeding has been harrasing, vexatious, and illegal throughout ; and that, by his illegal arrest and detention, &c., he has suffered damages to the amount of \$2000, which he claims in reconvention.

This case was tried twice before a jury. The first verdict was in favor of the plaintiff ; but the District Judge having granted a new trial, on the ground that the verdict was contrary to law and evidence, the second jury returned a verdict in favor of the defendant ; and the plaintiff, after a vain attempt to obtain a new trial from the judgment rendered thereon, took this appeal.

We think with the Judge, *a quo*, that the verdict first rendered was against law and evidence, and that the second verdict was correct. Without its being necessary to enter into any detail of the evidence adduced by the plaintiff in support of his action, and even admitting that the allegation of insolvency has been satisfactorily established, there is a circumstance disclosed by the facts spread on the record, which of itself is sufficient to destroy the plaintiff's action, if he ever had any. It is this : it appears that the plaintiff, having issued execution upon his judgment, the same was received by the Sheriff on the 14th of February, 1842, and that on the 21st of the same month, the defendant having been called on to satisfy the writ, and no property being found, the execution was returned, *nulla bona* ; whereupon, the present suit was instituted. But it appears also, that an execution having been previously issued at the suit of M. Wells against the defendant, the same had been received by the Sheriff on the 6th of January, 1842 ; that on the 13th of the same month, it was levied upon all the crop of cotton, ginned and unginned, belonging to the defendant and his wife, including therein twenty-five bales of cotton marked L. & T., and that the sale of all the cotton was enjoined by Lambeth & Thompson.

Now, under the 16th section of the law of 1840, an action of this kind cannot be instituted, unless the debtor has given an unjust advantage, or preference to any one of his creditors, *the effect whereof shall be to injure the complaining creditor*, or shall have made a conveyance, transfer, mortgage, or pledge of his property *to the prejudice of the complaining creditor*. Here, how can it be said that the alleged sale of the cotton to Lambeth & Thompson, supposing it to exist, was to have the effect of *injuring the plaintiff*, or that such sale was made to his prejudice? Wells had acquired in the mean time, previous to the issuing of the plaintiff's execution, and perhaps before the delivery of the cotton, a privilege upon the very property alleged to have been sold, *by the mere act of his seizure*, which privilege entitled him to a *preference over other creditors*. Code of Practice, art. 722. The plaintiff had no right to seize the cotton, and, therefore, it is clear that the alleged sale cannot have the effect of injuring him; since even supposing that the sale to Lambeth & Thompson was illegal and subject to be avoided, this is a matter between them and Wells, the result of which, if against Lambeth & Thompson, would turn to the exclusive advantage of Wells, by virtue of his right of privilege or preference over the other creditors of the defendant, without the plaintiff's being in any manner benefited thereby.

Judgment affirmed.

AMELIE COMPTON v. JOHN COMPTON, Her Husband.

Any creditor of the husband who alleges, that he has been aggrieved by a judgment for a separation of property between the spouses, may appeal therefrom, though not a party to the suit in the lower court. C. P. 571. C. C. 2408.

The words "*or otherwise disposed of the same*," in art. 2367, of the Civil Code, apply not to the price of the paraphernal property sold by the wife, but to the property itself, or its value, when, in any other case than that of a sale by the wife, the husband has disposed of it for his individual interest. The legal mortgage given to the wife, by that article, on all the property of her husband for the reimbursement of the value of her paraphernal property, is not confined to the case of the sale of the property, but extends to all cases where the husband receives money for his wife

Compton v. Her Husband.

or disposes of her property in any way for his individual benefit, and it attaches from the moment of such receipt or conveyance.

Though the wife has a right to administer personally her paraphernal property, without the authorization of her husband, and, even where she has left its administration to him, may resume it at any time, yet if, during his administration, he has sold any part of it, she has, under art. 2367, a mortgage on his property for its value.

APPEAL from the District Court of Rapides *King, J.* The plaintiff having obtained a judgment of separation of property from her husband, and declaring her entitled to a legal mortgage on all the immoveables and slaves in his possession for the reimbursement of paraphernal funds received by him. Brent, an ordinary creditor, appealed therefrom.

T. H. Lewis, for the plaintiff, contended that Brent, as an ordinary creditor, had no right to an appeal, not having made himself a party below.

O. N. Ogden, for the appellant. The wife has no mortgage on the property of her husband to secure her extra-dotal effects, but in the case provided for by art. 2367, of the Civil Code, that is to say, where the wife has alienated her paraphernal property in the manner there pointed out, and the husband *has received the amount (prix)* of the property *thus alienated* by his wife, or otherwise disposed of the same for his individual interest. The word "*same*" refers to its antecedent "*amount*." No privilege or mortgage can exist, unless expressly provided by law. Civil Code, arts. 3152, 3280. Under the title of "*mortgages*," the Civil Code expressly provides for the restitution of the dower. Had its framers designed to establish the general mortgage allowed by the judgment of the lower court, it would have been mentioned under that head. The reason which led to the allowance of a general mortgage for the restitution of the dower, and not of the extra-dotal property, is plain. The former is under the sole management of the husband. Civil Code, arts. 2317, 2327, 2330. He is not bound to give security for it, though insolvent. *Ib.* 2333. But of her paraphernal property the wife has exclusive control, if she choose to exercise it. *Ib.* 2361, 2364, 2365, 2368. If she allow it to go into the hands of the husband, he is only her mandatary. She can resume its management at any

time ; or annex any conditions to his management, as by requiring security for its return, &c. She has, consequently, no need of a tacit mortgage or lien in order to protect herself, as in the case of her dotal property.

MORPHY, J. This is a devolutive appeal, taken by James Fenwick Brent, on the allegations that he is a creditor of the defendant to the amount of one thousand dollars, that he is aggrieved by a judgment of separation of property rendered in this case, and that there is error in the same. A motion to dismiss this appeal has been made, on the ground, that Brent, as an ordinary creditor of John Compton, has no right to interfere in this case by appeal, he not having been a party to the suit in the lower court ; that the judgment rendered can work no injury to him ; and that this is not a case wherein persons not parties to the original suit can appeal from the judgment rendered therein. This motion cannot, in our opinion, prevail. Independent of article 571, of the Code of Practice, which gives to third persons in general the right of taking an appeal in a suit to which they are not parties, when they allege, that they have been aggrieved by the judgment, the Civil Code, art. 2408, expressly gives to the creditors of the husband the right of becoming parties to the suit for a separation of property, and authorizes them to object to the separation decreed and even executed, with a view to defraud them. Our law looks with a suspicious eye upon a separation of property between husband and wife, and has afforded to the creditors every facility for protecting their rights. We can see no good reason why they should not be permitted to make themselves parties to such a suit, by appealing from the judgment of separation, as they are expressly allowed to do, by intervening in the court below.

The judgment appealed from, after pronouncing a separation of property between the parties, and giving to the wife all her paraphernal property existing in kind, decrees the defendant to pay her a sum of \$23,212 80, and allows her a legal mortgage on all his immoveable property and slaves, to secure the said sum, from the different dates at which he received the moneys forming that amount. There is no dispute as to the correctness of the judgment in relation to the extent of the plaintiff's paraphernal rights

and claims. The record shows, that at the sales of the estates of the father and mother of the plaintiff, her husband purchased property to an amount exceeding the sums accruing to her as one of the heirs, and settled with the other heirs retaining these sums, which, with other small amounts received during the lifetime of her parents, form the total amount decreed to her. But it is contended, that the judgment erroneously recognizes, and gives to the wife a legal mortgage on the defendant's property, for the sums thus received by him; that under art. 2367, of the Civil Code, which is the only one which gives her a mortgage for her paraphernal property, she is entitled to it only where she sells her paraphernal property, and it is proved, that her husband has received the price, or otherwise disposed of the same. Our understanding of this article is different from that contended for by the appellant, and accords with our repeated and uniform adjudications on the subject, before, and since the promulgation of the present Civil Code. We think, that the phrase "or otherwise disposed of the same" in that article, applies not to the price of the paraphernal property sold, but to the paraphernal property itself, or its value when, in any other case than that of a sale by the wife, the husband has disposed of it for his individual interest. In the case of a sale of paraphernal property by the wife, with the authorization of her husband, her mortgage attaches the very moment the latter receives the price. No proof of the subsequent use, or disposition of the money by the husband, is required of her. If this be so, the second member of the sentence would be superfluous, if understood to apply only to the price, because he could not dispose of it without having received it. Although the language of the article may not be free from doubt, and is not as explicit as it might have been, we believe, that it embraces not only the particular case of a sale of paraphernal property by the wife, but also all cases in which the husband receives for his wife money, or disposes of her property in any way for his individual benefit. There is no good reason why the wife's mortgage should exist in the one case, and not in the other. Such is the construction which we put upon this article after much consideration in a case decided last winter in the Eastern District. See *Johnson v. Pilster*, 4 Robinson, 71. We

can see nothing in the argument, that the wife's mortgage for her paraphernal property should be limited to the case of a sale made by herself, because her husband's intervention is rendered necessary, and her rights are under his control. Husbands have under their control the personal and possessory actions to which their wives are entitled; they can sue in their own name, for the recovery of debts due to them, for a partition of moveable property in which they are concerned, &c. Code of Practice, art. 107. 6 Mart. 667. 11 Mart. 443. In these cases the rights of the wife are as much under the control of her husband, as in that of a sale in which his assistance is necessary. It is true, that the wife has the right to administer personally her paraphernal property, without the authorization of her husband, and that if she has left to him the administration of it, she may at any time resume it; but if, during his administration, he has sold any property, she has, according to our understanding of article 2367, a mortgage on his property for the value, or price of the property thus sold. It is said, that the construction contended for by the appellant is strengthened by the circumstance, that none of the articles of the title of "Mortgages" in the Code, speak of a mortgage to secure the paraphernal property of the wife, while they establish, *in express terms*, that given to her for the restitution of her dowry. We do not feel the force of the inference drawn from this omission to repeat, in that title, a provision existing in another part of the Code. Article 3280, which is relied on, provides, that "no legal mortgage shall exist, except in the cases determined by the present Code," evidently referring to legal mortgages allowed in other parts of the Code, besides those expressly mentioned under the head of legal mortgages. See the case of *Johnson v. Pilster*, 4 Robinson, 71, and the authorities there quoted.

Judgment affirmed.

Lewis v. Fisk and another.

GEORGE W. LEWIS v. ABIJAH FISK and another.

Plaintiff having obtained an injunction from a State court, to stay an execution about to be levied on his property, was subsequently declared a bankrupt by the District Court of the United States, under the bankrupt law of 1841. A rule having been afterwards taken in the State court, to show cause why the injunction should not be dissolved, or further security given: *Held*, that by the decree of bankruptcy, the State court was divested of all jurisdiction, having no authority to decide questions involving the adjustment of privileges and liens among the creditors of the bankrupt, or the distribution of the funds of his estate.

Under the bankrupt law of 1841, all the estate of the bankrupt is, by the issuing of the decree of bankruptcy, *ipso facto*, vested in the assignee. It is his duty to take possession without delay, and to administer the property to the best advantage for the benefit of the creditors. If resistance be made, the State courts will grant the necessary process to enable him to do so. The assignee may make himself a party to suits in the State courts in place of the bankrupt, and take the necessary steps to protect the property and interests confided to his care.

If the goods of one who has been declared a bankrupt under the act of 1841, be seized in execution and sold, before possession has been taken by the assignee, they may be recovered in an action against the Sheriff, or the plaintiff in execution, if he accompanied the Sheriff, or specially directed the seizure.

APPEAL from the District Court of Natchitoches, King, J.

GARLAND, J. Lewis presented his petition, stating that Fisk had obtained a judgment against him, by confession, in the Commercial Court of New Orleans. He avers, that when said confession of judgment was made, there was an agreement between him and Fisk, that no execution should be issued on it, until he (Lewis,) should request it. He alleges that Fisk has issued an execution in violation of the agreement made between them, and has levied it on all the stock of merchandize in his (Lewis') store, and is about to sell the same.

He further represents, that he is in insolvent circumstances, and was then preparing his schedule and papers, preparatory to taking the benefit of the Bankrupt law, passed by Congress in 1841, but that he had not time to complete the documents, as the sale would take place the next day. He, therefore, prays that the Sheriff and Fisk may be enjoined from proceeding on the execution, that he (Lewis,) may take the necessary measures to

have his property, or its proceeds fairly distributed among his creditors. The injunction was accordingly issued.

Fisk, for answer to this petition, admitted all the allegations in it, except the one that he had agreed not to issue execution on the judgment against Lewis; this he denied; and, in answer to the interrogatories propounded to him, said positively, that there was no such condition as that alleged, nor any condition whatever attached to the confession of judgment in his favor.

At the term of the court subsequent to the filing of the answer, Henry A. Bullard appeared, and in a petition of intervention, alleged himself to be the assignee of Lewis, who had been decreed a bankrupt by the District Court of the United States, for the Western District of Louisiana. Bullard alleged, that all the property and estate of the Bankrupt had vested in him in trust for all the creditors. He stated the existence of the seizure under the execution enjoined, and referred to the petition for the injunction and to the allegations it contained. He prayed to be allowed to intervene, and to be made a party in the place and stead of Lewis, and that the goods seized, might be delivered to him as such assignee, free from any lien or incumbrance on account of the seizure, which he averred to be null and inoperative, as soon as the said Lewis became a bankrupt. He further represented, that the judgment by confession in favor of Fisk, on the eve of bankruptcy, was a fraud, and that the confession of the same, and the seizure thereon, conferred no rights. He further represented, that Fisk had proved his claim as a creditor of the bankrupt, under the decree. He, therefore, prayed that the injunction might be made perpetual; that the goods seized might be declared his property as assignee, reserving to Fisk his right to share in the distribution of the funds of the bankrupt's estate, to be made under the order of the District Court of the United States. The service of this petition was acknowledged by the counsel for Fisk, who also entered into an agreement with the intervenor, as assignee of the bankrupt, that the goods seized should be sold by the Sheriff, and the proceeds retained in his hands, until the decision of this suit, and then paid to the party entitled to them by the decision.

Various exceptions were taken by the counsel of Fisk to this intervention after it was filed, but it is not necessary to state

them, as no judgment was rendered on them in the court below. The fact of the bankruptcy of Lewis, and the appointment of his assignee is not denied. A motion was then made by the counsel of Fisk, to dissolve the injunction, because the sureties on the bond had become insolvent, since they signed it. The record does not inform us, whether this motion was notified to the assignee. He made no objection to it in writing; and we can only infer, that it was known to him, or his counsel, from the fact of some person having cross-examined the witnesses called to testify as to the situation of the sureties. The Judge ordered the plaintiff to give additional security on the bond within eight days, which not being given, he dissolved the injunction with \$100, as special damages. From this judgment, the assignee has appealed.

The counsel for the appellee insists upon the affirmance of the judgment, on the authority of the articles in our code which declare, that when a party is legally required to give security, he must give such as is good and sufficient; and that if the sureties given become insolvent, others that are good must be substituted. But it has escaped his attention, that there are other questions in the case, much more important. The judgment orders the plaintiff, (Lewis,) to give the additional security, and in default thereof, dissolves the injunction, and decrees him to pay damages. At the time when this decree was rendered, it is not denied that Lewis had been declared a bankrupt, and was, therefore, incapable of standing in judgment. If, by the petition of intervention, it is to be understood that the assignee had become a party to the suit in the place of Lewis, the order to give security would not seem to apply to him in his capacity of assignee. But admitting that it does, it is erroneous, as the Judge had no authority to make such a decree after the bankruptcy. Other persons then became interested in the questions, whether the judgment in favor of Fisk was collusive and fraudulent, or whether he had obtained a lien on the merchandize seized under his execution; which questions, we think, are exclusively cognizable in the District Court of the United States, when the assignee proceeds to make a distribution of the funds collected. The State tribunals have nothing to do with a question, whether a judgment was rendered in fraud, or

for the purpose of giving an undue preference, in contemplation of bankruptcy, after the bankruptcy has been decreed ; nor can they pass upon the questions that may arise, as to liens and preferences among the creditors. In various cases in the Eastern District, we have arrested parties, who were proceeding under orders of seizure, attachment, and executions, notwithstanding the decree in bankruptcy. See *Clarke, Assignee of Zabriskie v. Rosenda and another*, 5 Robinson, 27, and other cases.

When the decree in bankruptcy issues, all the bankrupt's estate and effects of every kind, *ipso facto*, vest in the assignee, fully and absolutely. It is his business to take possession without delay, and to proceed to administer the property to the best advantage for the benefit of the creditors ; and if resistance be made to his taking possession, the courts will, on application, grant him the necessary process to enable him to do so. He may make himself a party to suits in which the bankrupt is a party in the State courts, and take the legal steps to protect the property and interests confided to his care ; but neither he, nor the creditors, can call upon the State tribunals to decide upon questions involving the distribution of the fund, or the adjustment of privileges, or liens, or fraudulent preferences given by the bankrupt, or the like questions. If the bankrupt's goods be taken in execution and sold, after a decree has issued, and before possession is taken by the assignee, they may be recovered in an action against the Sheriff, or against the plaintiff in the execution, if he accompanied the Sheriff, or specially directed the seizure. Owen on Bankruptcy, 252, and authorities there cited.

To show more conclusively, that the State tribunals have not in cases of bankruptcy, any right to pass upon such questions as are presented in this case, we will suppose that we were trying the case upon its merits. The first question would be, that of collusion between Lewis and Fisk, as to the confession of judgment, and the agreement not to issue execution, and whether this was in contemplation of bankruptcy, and for the purpose of giving an unjust preference ; and secondly, whether Fisk by his seizure, had acquired a lien on the goods seized. Is it not clear, that these are questions in which all the creditors of the bankrupt are interested ? Is it not also clear, that if our decision did not accord

Prentice v. Chewning.

with that of the Judge of the United States Court, he could order the assignee, in distributing the funds, to give a preference or not? And would not the assignee be bound to obey his decree?

The judgment of the District Court is, therefore, annulled and reversed; and we do prohibit, and enjoin the defendant Fisk, and the Sheriff of the Parish of Natchitoches, from proceeding further on the execution enjoined, the defendant Fisk paying the costs in both courts; but reserving to him all his rights against the assignee of Lewis, in any court that has jurisdiction over them.

Sherburne and J. B. Smith, for the plaintiff.

Pierson, for the defendants.

Bullard, appellant, *pro se*.

HORACE PRENTICE V. JAMES J. CHEWNING.

Plaintiff having obtained a judgment and issued execution against the defendant, certain property was seized, and sold with the consent of the latter. By an agreement between defendant and the purchaser, it was stipulated, that if defendant should pay the amount of the judgment, with costs and interest, to the purchaser by a certain time, the sale should be null, and the property belong to defendant; otherwise, the property to belong irrevocably to the purchaser. Defendant afterwards sold his right of redeeming the property, to a third person. *Held*, that these facts amount to a compromise, and satisfaction of the judgment, and deprive the defendant of the right of contesting its correctness by appeal.

APPEAL from the District Court of Carroll, *Curry, J.* The plaintiff having recovered a judgment for the amount of certain promissory notes, the defendant appealed. A motion to dismiss the appeal, on the ground of a voluntary execution of the judgment, was overruled, at the October term, 1841, (1 Robinson, 71,) the evidence in the record then before the court not sufficing to establish the fact of voluntary execution. The judgment of the lower court was, however, reversed, on account of an illegality in the composition of the jury, and the case remanded for a new trial. By an amended answer, filed after the return of the case to the District Court, the defendant alleged, that an illegal judgment had been rendered against him on the former trial, from which he

took a devolutive appeal, and which was reversed by the Supreme Court; that, in the interval between the rendering of the judgment and its reversal, plaintiff caused an execution to be levied on his property, which was satisfied by the sale of his property, from which plaintiff received \$6500; and that, by the sacrifice of the property he, defendant, has sustained damage to the amount of \$20,000, which he claimed in reconvention.

There was a verdict and judgment, on the second trial, in favor of the defendant, for \$1616 40, with interest at eight per cent, from the 15th of May, till paid. From this judgment the plaintiff took the present appeal.

Stacy and Sparrow, for the appellant, contended, that the defendant had voluntarily executed the first judgment, and thereby deprived himself of all right to contest its correctness. Code of Practice, art. 567. 2 La. 265.

Willson and Stockton, for the defendant.

BULLARD, J. When this case was before us at a former term, (1 Robinson, 71,) a motion was made to dismiss the appeal, on the ground that the defendant and appellant had acquiesced in the judgment. The evidence then before us, did not authorize us to say, that there had been such a voluntary execution of the judgment as to preclude an appeal. The cause was remanded for a new trial. On the return of the cause to the court below, the plaintiff filed an amended petition, in which he set forth, that since the first judgment rendered, the parties had entered into a compromise of all the matters in litigation in the suit, as would appear by the Sheriff's return on the *fiery facias*, and the twelve months bond given by Selby, without security, and the counter letter between Chewning and Selby.

The Sheriff's sale shows, that the tract of land was sold with the consent of Chewning, under an execution issued in the case, and that Selby became the purchaser. The agreement between Selby and Chewning, which is called a counter letter, recites that Selby had bought at the Sheriff's sale, with the consent of Chewning, in the suit of *Prentice v. James J. Chewning*, No. 261, the south half of lot Nos. 67, and the whole of lots Nos. 68, 69 and 70, in Township No. 22, Range 13, east, and also the north half of lot No. 1, in Township No. 21, same range, containing 700

Prentice v. Chewning.

acres, more or less, *for six thousand five hundred dollars*; and also, one undivided half of certain slaves. It was agreed, that if Chewning should pay to Louis Selby, or his order, the full amount of the judgment, costs, and interest in the same case, at any time before the second day of November, 1841, then the Sheriff's sale, and the sale of the slaves, should be null and void, and the said negroes should be the property of Chewning, as if these sales had never been made. It was distinctly understood, that if Chewning should make a legal tender of the full amount of said judgment to said Selby, before November 2, 1841, all said sales should be null, and the property should be Chewning's again; if otherwise, then the said property to be absolutely and irrevocably Selby's. Chewning waives any right he may have to require Selby to put him in delay; and on the contrary, Chewning is to call on Selby, and tender him the money, or, in his absence, to deposit it in bank.

There is another document in the record, showing, that Chewning had sold, in consideration of \$4000, to W. Bailey, his right of redemption to the land in the agreement with Selby, and authorizing Selby to make a deed to him (Bailey) of the land, on his paying the amount of the judgment described in the contract.

The Sheriff's deed to Selby shows, that the land was sold to him, for \$6500, with the consent of both parties, on a credit of one year, without requiring security. Chewning signed the deed.

If the same evidence had been before us on the former appeal, we should have dismissed it, on the ground of a voluntary payment of the judgment by the appellant. The facts now come out upon the new trial, and satisfy us, that the contract between Selby and the defendant, with the consent of the plaintiff, and the sale by Chewning of his right to redeem, amount to a compromise or transaction, and satisfaction of the first judgment.

It is, therefore, ordered and decreed, that the judgment of the District Court be reversed; and it is further ordered, that the judgment first rendered be reinstated, and that the plaintiff proceed to enter satisfaction on the same as extinguished by the transaction set forth in the amended petition, and that, for this purpose, the case be remanded to the District Court; and that the defendant pay the costs of the appeal.

WILLIAM J. MINOR v. THOMAS ALEXANDER, Dative Testamentary Executor of the last will of David Alexander, and others.

A vendor will not be responsible, where the purchaser has voluntarily surrendered the possession of the thing sold, without any action having been brought against him.

The holder of a promissory note, protested for non-payment, is entitled to interest on the amount from the day of protest. Act 14 February, 1831, sect. 2.

The maker of a note given for the price of a tract of land, is bound, under art. 2531, of the Civil Code, to pay legal interest on the amount from the time when it became due, till payment.

The provisions of arts. 3314, 3316, of the Civil Code, that neither the contracting parties, nor their heirs, can take advantage of the non-inscription of a mortgage, are not irreconcilable with art. 3333, of the same Code, which declares, that the effect of a mortgage will cease, even against the contracting parties, if the inscription has not been renewed before the expiration of ten years from its date. The intention of the legislator was, that a mortgage whether inscribed or not, shall cease to have its legal effect after ten years, to be reckoned, when not inscribed, as to the parties, from its date, and as to third persons from the time of its inscription, unless renewed before the expiration of that term; that, though the mortgage to have effect between the parties, need not be recorded during the first ten years from its date, yet to continue in effect afterwards, it must have been inscribed, as directed by art. 3333, before the expiration of that period; and that this inscription may be considered as a renewal of the mortgage between the parties, and against third persons.

APPEAL from the Court of Probates of Concordia, *McWhorter, J.*

SIMON, J. The plaintiff is appellant from a judgment which reduces his claim, which was originally for the sum of \$2666 66 with interest, to \$1639 39, with legal interest from judicial demand.

The plaintiff's demand is based on two notes of hand, both dated the 27th of January, 1829, one of which is payable two years, and the other three years after date. The notes were duly protested at maturity.

The defence sets up, that the notes sued on were given to secure the payment of the price of two tracts of land, which were purchased by the drawer, of the plaintiff's ancestor. That one of

Minor v. Alexander, Executor, and others.

the tracts so purchased was described and limited by certain metes and bounds, which entitled the drawer to all the land embraced within the boundaries set forth in the deed of sale; but that, to a large part of the tract so described, the vendor never had any title, nor was he ever in possession thereof, as one Samuel Davis had, at the time of the sale, and has continued ever since to have and to hold title and possession of a large part of said tract, to wit, between eighty and a hundred acres thereof. The defendants pray, that the plaintiff may be ruled to answer certain interrogatories; and, as no demand of payment was ever made at the place where the notes were made payable, that the suit may be dismissed, &c.

The judgment of the court, *a qua*, refuses to allow to the defendants any diminution of the price for the deficiency pleaded in the answer, in relation to that portion of one of the tracts sold, alleged to be in the possession of Samuel Davis; but allows a deduction of \$1027 27, from the original price of the sale, for the loss of a tract of *one hundred superficial acres*, also mentioned in the deed of conveyance to have been purchased by the drawer of the notes, as being another tract *adjoining, in the rear, the tract already described, being a back concession, &c.* The judgment recognizes also the mortgage claimed by the plaintiff upon the land sold, as having its effect against Mrs. Montgomery, the widow of the purchaser, who is the owner of one-half of the tract, although ten years having elapsed from the first recording of the mortgage, the same was not re-inscribed until several years afterwards.

Among the errors assigned by the plaintiff and appellant, he contends: 1st. That he is entitled to interest from the protest of the notes, instead of from the commencement of the suit. 2d. That the defendants are entitled to no diminution of price on account of the one hundred acres back concession.

On the other hand, the appellees have prayed, in their answer, that the judgment appealed from may be amended so as to allow them a *pro rata* deduction for the eighty acres of land possessed by Samuel Davis, out of the first described tract, upon the price of the whole tract, as agreed to in the deed of sale; said deduction to be made at the rate of eight dollars per acre.

From the pleadings of the parties, and from the evidence ad-

duced by them on the trial of this cause, we have to consider four questions :

1st. As to the right set up by the defendants to claim a deduction from the price, for the deficiency in quantity alleged to exist in the tract of land first described in the deed of sale, which deficiency is stated in the answer to be between eighty and a hundred acres.

2d. As to the right of the defendants to obtain a deduction from the price for the loss of the one hundred acre tract, as allowed by the judgment appealed from.

3d. As to the right of the plaintiff to recover interest on the amount of the notes sued on, from the date of the protest, and not from the judicial demand.

4th. As to the effect of the mortgage which the plaintiff pretends to have on the property, although the act of mortgage was not re-inscribed before the expiration of ten years, but subsequently.

I. The evidence establishes, that the notes sued on were given in consideration of the price of two tracts of land, sold by the plaintiff's ancestor to David Alexander, on the 1st of June, 1829, for the sum of \$4000, stated in the deed of sale to have been paid in hand by the purchaser. The first of these tracts is therein described to be a certain tract of land, on lake Concordia, containing 480 *arpens*, more or less, bounded on the north west by lands granted to William Lintot, on the north by vacant land, on the east by lands of Stephen Minor and Jonathan Dayton, and on the south by lake Concordia. It appears, that a small portion of land lying between Joseph Minor's, Stephen Minor's, and Jonathan Dayton's tracts, and designated on the plat by Nos. 1, 2, and 3, of Sect. No. 31, is pretended to be a part of the land sold, and to be in the possession of one Samuel Davis, who sets up a title to it by virtue of a patent issued from the government of the United States, for the lots No. 1, and 2, on the 23d of June, 1842. It is admitted, however, that Joseph Minor's claim was confirmed by the Commissioners of the United States, on the 6th of May, 1811, to 460 superficial *arpens*, being $389\frac{2}{3}$ acres on the north east margin of lake Concordia, bounded on the west by lands of William Lintot, and that the section on the map marked No. 30,

which is in the possession of the legal representatives of David Alexander, contains $354\frac{2}{3}$ acres. The evidence shows further, that the allegation made in the answer, in relation to the non-possession of the small portion of land in controversy, at the time of the sale, is positively contradicted by the testimony of Thomas Alexander, who states, that Davis has had thirty acres thereof in cultivation, ever since 1838; that after the purchase, he, witness, *took possession, and kept it until 1839*; and that in 1837 or 1838, he agreed to pay Davis rent for the land, if he kept it. He testifies further, that Mrs. Montgomery (David Alexander's widow) was in possession of the whole of Joseph Minor's tract from 1831, up to 1837; he thinks that there are about seventy-five or eighty acres of land lying between the Joseph Minor and the Stephen Minor tracts; and he states, that he, witness, *took possession of lots No. 1, 2, and 3, of Sect. 31, (the portion said to be claimed by S. Davis,) under the sale made by John Minor to David Alexander, and held possession of it until he gave it up to Davis, in 1837.* He adds, that *some of the timber was deadened during the lifetime of David Alexander.*

From this evidence it is clearly shown, that the whole tract, now said to be deficient in its quantity by about eighty acres, was delivered by John Minor, the vendor, to David Alexander, the vendee, and that it was possessed for a number of years under the sale. If the vendee ever was dispossessed of any part thereof, it was by his own voluntary act, for it is positively proved by the testimony of the defendant, Thomas Alexander, sued here as the executor to his brother's estate, that *he himself gave it up to Davis.* If so, he divested himself of the possession of the land in controversy, without any action brought against him for that purpose, and we cannot consider his eviction but as a voluntary one, for which the vendor is not responsible. How could he settle this question of title with Davis without giving any notice to his vendor? The latter was bound in warranty, it is true, but he was so bound according to law. We agree with the Judge, *a quo*, that the evil complained of, was an evil sought, and not shunned; and as Davis' title cannot be inquired into in this suit, and as the defendant has not attempted to show, that the title transferred by the plaintiff's ancestor is inferior in dignity to that

of Davis, we must conclude that the defendant is without remedy.

II. This question is not presented by the pleadings, and a careful examination of the record has convinced us, that it ought not to have been acted upon by the lower court. The answer only sets up a claim to a diminution of the price, in relation to the deficiency in quantity alleged to exist in the tract of land first described in the deed of sale; and, although the record contains some evidence relative to an adverse claim to, and want of location of the one hundred acre tract, sold as a back concession, we are unable to see how the Judge, *a quo*, could take this question into consideration, beyond the matters in controversy presented by the pleadings.

III. The notes sued on were duly protested at maturity, and ought to bear interest at the rate of five per cent, from the time when they became due, until paid. B. & C.'s Digest, p. 42, No. 7. And besides, the consideration of the notes being the price of a tract of land, the buyer is bound by law to pay the legal interest thereon, from the time it became due, until payment. Civil Code, art. 2531.

IV. By consent of counsel, Mrs. Montgomery, who is the widow of David Alexander, was allowed to be heard on this point. It appears, that after the death of David Alexander, the half of the tract in question was sold at a probate sale, and purchased by the widow, who owned also the other half as the widow, in community. Afterwards, the widow and her second husband sold the whole tract to Rowley. In the mean time, a suit was brought by the heir of David Alexander, to cancel the probate sale. Pending said suit the land was re-transferred by Rowley to Montgomery and wife, and the property returned back to the succession in community between the deceased and his widow, in consequence of the cancelling of the probate sale. We think the Judge, *a quo*, erred. It is true, that by art. 3316, of the Civil Code, a mortgage need not be inscribed to have effect between the contracting parties, and that by the terms of art. 3314, the inscription is only required with regard to third persons whom it may prejudice; but art. 3333, provides, that as the registry preserves the evidence of mortgages and privileges, *during ten years, their effect ceases*,

even against the contracting parties, if the inscriptions have not been renewed before the expiration of this time, &c. This last article appears to be in contradiction with the preceding one, 3316, which gives effect to the mortgage as between the parties, without any registry. It seems to us, however, that they may be easily reconciled. It is evident, that the intention of the lawmaker* was, that a mortgage, whether inscribed or not, *should cease to have its legal effect after ten years, unless renewed before the expiration of the time*; and that the want of registry should prejudice the contracting parties as well as third persons, if not made before the expiration of ten years from the date of the mortgage with regard to the parties themselves, or of its first inscription with respect to third persons. From these different provisions of our law, it seems to us that it may be fairly inferred, that although the mortgage need not be originally recorded to have effect between the contracting parties, still, it is required, that in order to continue after ten years to have the effect it had, as to them only, whilst it was not registered, the mortgage should be inscribed as directed in art. 3333; and that this second, or new inscription may be considered as a renewal of the mortgage between the parties, and against third persons. This interpretation, in our opinion, gives full effect to the two provisions of the law, apparently contradictory, and is subject to less inconvenience in their application, than if they were construed in their literal sense.

Here, the vendor's mortgage was not re-inscribed until about twelve or thirteen years after the date of the act, and we must conclude, that its effect had ceased, even between the parties, at the time of the second registry.

It is, therefore, ordered, that the judgment of the Court of Probates, except so far as it rejects the defendant's, Alexander's, claim to a diminution of the price for the alleged deficiency in quantity of the tract of land alluded to in the answer, be annulled, and reversed; and in addition to the part of said judgment which is hereby affirmed, it is ordered and decreed, that the plaintiff do recover of the defendant, Alexander, testamentary executor, in the capacity in which he is sued, the sum of two thousand six hundred and sixty-six dollars and sixty-six cents, with five per cent. per annum interest on \$1333 33, from the 27th of January,

Evans v. Wilkinson.

1831, until paid, and the same interest on \$1333 33, from the 27th of January, 1832, also until paid ; and that the costs in both courts be paid by the defendants and appellees.

T. H. Farrar, for the appellant.

Shaw and Stacy, for the defendants.

ELIJAH EVANS v. JAMES MADISON WILKINSON.

The purchase by one who had acted as the attorney at law of defendant, of a good and valid title to the land in controversy, from persons not parties to the litigation concerning it, is not such a purchase of a litigious right, as is declared to be null by art. 2422 of the Civil Code.

APPEAL from the District Court of Madison, *Curry, J.* The plaintiff is appellant from a judgment rendered, in accordance with the verdict of a jury, decreeing the land in dispute to be the property of the intervenor, *George W. Copley*.

Stacy, for the appellant.

Dunlap, for the defendant.

Copley, pro se.

BULLARD, J. • *Elijah Evans*, the plaintiff, sets forth in his petition, that he is the true and legal owner of a certain lot of land, known as lot or fractional section No. 18, in Township No. 16, of Range No. 12 east, containing one hundred and sixty acres, more or less, which he acquired by entry at the Land Office at Ouachita, in 1833, in virtue of a pre-emption claim, under the act of Congress, of 1829 ; and, that notwithstanding the premises, one *James M. Wilkinson* has taken possession of the same, and claims it as owner. He prays that *Wilkinson* may be cited, and condemned to surrender the land, and to pay damages, and for general relief. In an amended petition, he prays for judgment upon the title, and that the land may be decreed to belong to him.

The defendant, in his answer, denies that he is in possession of any land belonging to the plaintiff. He asserts, that he holds the land in the right of his wife *Rebecca Houston*, and the minor children of *Alexander Houston*. He avers that the land was con-

Evans v. Wilkinson.

veyed by the plaintiff to the said Alexander Houston, deceased, the former husband of the said Rebecca, by deed dated in 1832.

There is an answer in the record to the amended petition, signed by Downs, Copley, and Dunlap as counsel for the defendant.

After the cause had been pending more than two years, George W. Copley filed his petition of intervention, and represented, that on the 9th of March, 1840, *pendente lite*, Osborn & Ward, of Catahoula, entered at the land Land Office the same lot No. 18, Township 16, of Range 12 east, and on the 23d of the same month, conveyed the same to him. He prays that the land may be decreed to be his, and that he may be put in possession of the same.

The duplicate receipt of the Receiver of public moneys for the price of the lot paid by Osborn & Ward, and their conveyance to Copley, are both annexed to his petition. On the 9th of April, 1841, Jesse Stanborough also intervened, and claimed title to the same land. He alleges, that he acquired title from James S. Douglass, by act under private signature, dated in November, 1835, and that Douglass acquired title by purchase from Elijah Evans, the plaintiff.

This last intervenor, excepting to the intervention of Copley, alleges, that the right to the land in dispute was, at the time he purchased, a litigious right, and had been so since 1839, the inception of this suit; that Copley was, and still is a public officer, to wit, an attorney at law, and is the attorney of record of the defendant in this case; and that he was, therefore, incapable of purchasing the same, and his title is a nullity; and he prays, that the title may be adjudged to belong to the intervenor.

It appears that Evans was allowed to locate a *float* upon the lot in question, which contained one hundred and sixty acres; that he sold one-half to Houston, and the other half to Douglass, who sold to Stanborough; that afterwards, the Commissioner of the General Land Office cancelled and annulled the entry, on the ground, that a float for eighty acres could not legally be located on what is called a river lot, containing about one hundred and sixty acres, which had been laid off under the act of Congress of 1811, which provided for the anomalous survey of lots on water

courses, with a depth of forty acres ; and that Osborn & Ward afterwards purchased the same lot of the government, and sold to G. W. Copley, the intervenor, who gave in evidence a patent from the United States.

Upon the question of title, therefore, according to the evidence in the record, we have no doubt. The patent must prevail, and the judgment be affirmed, awarding the land to Copley, unless we should be of opinion, that the exception of Stanborough, praying that Copley's purchase may be declared null, as that of a litigious right, he being the attorney of record of the original defendant, ought to be sustained.

If the client of Copley had set up a similar exception, complaining of his act, and had insisted that the purchase made by the attorney should accrue to his benefit, on his paying what it had really cost, according to article 2622 of the Civil Code, it would have presented a different question. But the exception of Stanborough is based upon a different provision of the code, contained in article 2422, which provides, that "public officers connected with courts of justice, such as Judges, Advocates, Attorneys, Clerks, and Sheriffs, cannot purchase litigious rights which fall under the jurisdiction of the tribunal in which they exercise their functions, under penalty of nullity, and of having to defray all costs, damages, and interest."

We are not prepared to say that the purchase by Copley of a good and valid title to the tract of land in controversy, from persons not parties to the litigation concerning it, was such a purchase by an attorney at law, or other officer of the court, of a litigious right, as the code declares null. The right in litigation in the case, was the title to the tract of land under the original purchase of Evans. The title acquired by Copley's vendors was from the United States, after the entry of Evans had been cancelled. We think the purchase here shown, is not such as is contemplated by that article of the code, and, that such a contract as the present, cannot be declared null, under that provision of the code. We understood Mr. Copley to say, in the course of the argument, that his purchase was intended for the benefit of his clients, and we hope, for the honor of the profession, it may turn out to be the case.

Brooks v. Norris.

The evidence shows clearly, that Copley has the best title to the *locus in quo*.

Judgment affirmed.

JEHIEL BROOKS v. SAMUEL NORRIS.

Recognitive acts do not exempt the party offering them from the necessity of producing the primordial title, unless its tenor be therein specially set forth. C. C., 2251.

Recognitive acts are either *ex certa scientia* or *in forma communi*. The former said to be in *forma speciali et dispositiva*, are those in which the primordial title is set forth; they are equivalent to the original title in the event of its loss, and prove its existence against the person making it, dispensing with its production. Recognitive acts in *forma communi*, are those in which the tenor of the primordial title is not set forth, serving only to confirm it so far as it is true, and to interrupt prescription; they do not prove its existence, nor dispense with its production.

By the common law, where the recital of a deed points to higher evidence in the power of the party, the withholding of which creates suspicion of fraud or unfairness, the party will be held to account for the non-production of the higher evidence, before the recital can avail him.

The Caddo tribe of Indians were never recognized as the proprietors of any lands, either by the Spanish or American governments.

The Spanish government never acknowledged any primitive title in the Indian tribes to lands on this continent.

In the treaty between the United States and the Caddo Indians, of the 1st of July, 1835, that tribe were not treated with as the owners, but merely as the occupants of the territory, from which it was the object of the government to induce them to remove.

The provision in the first supplementary article to the treaty of 1835, between the United States and the Caddo Indians, relative to a reservation in favor of the heirs of François Grappe, is a mere confirmation of such grant as may have been made by that tribe in 1801, and not a substantive grant of so much land from the government. The recital by the Indians that they had made such a grant, is not conclusive upon the government.

An objection to a witness on the ground that a suit was pending against him, by the same plaintiff, for other tracts of land, claimed under the same title, and that he had set up the same defence, goes to his credibility, and not to his competency, he being interested in the question, but not in the case.

An admission in a treaty between the United States and a tribe of Indians, as to the limits of the territory occupied by the latter, is only binding on the government, and those claiming under it after the date of the treaty; it is not conclusive on those

who had previously acquired rights. The latter may go behind the treaty, and show that the whole proceeding was, as to them, fraudulent and void.

The settlers on the section of country known as the Neutral Territory, between the Arroyo Hondo and the Sabine, within the limits of the present state of Louisiana, acquired no title to the lands occupied by them, under any custom or usage of the Spanish government, independent of the act of Congress by which their titles were confirmed.

APPEAL from the District Court of Caddo, *Boyce, J.* The plaintiff is appellant from a judgment against him. He claimed a tract of land, under a conveyance from the sons and heirs of one François Grappe, whose title rested on a reservation in his favor, contained in a supplementary article to a treaty, of the 1st July, 1835, between the United States and the Caddo Indians. This article, after reciting that the Caddo Indians had, in the year 1801, made a donation to the said Grappe, and his three sons, in the presence of the Spanish authorities at Natchitoches, of four leagues of land, declares that, "It is agreed that the legal representatives of the said François Grappe, deceased, and his three sons, Jacques, Dominique, and Balthazar Grappe, shall have their right to the said four leagues of land reserved to them, and their heirs and assigns forever; the said land to be taken out of the land ceded to the United States by the said Caddo nation of Indians, as expressed in the treaty to which this article is supplementary. And the said four leagues of land shall be laid off in one body in the south east corner of their lands ceded as aforesaid, and bounded by the Red River four leagues, and by the Pascagoula bayou one league, running back for quantity from each, so as to contain four square leagues of land in conformity with the boundaries established and expressed in the original deed of gift, made by the said Caddo nation of Indians to the said François Grappe, and his three sons, Jacques, Dominique, and Balthazar Grappe." The third supplementary article provides that, "These supplementary articles, or either of them, after the same shall have been ratified and confirmed by the President and Senate of the United States, shall be binding on the contracting parties; otherwise to be void, and of no effect upon the validity of the original treaty to which they are supplementary." The deed said to have

been executed by the Caddos in 1801, was not produced, nor satisfactorily accounted for.

The defendant claimed title to the premises in virtue of actual residence and cultivation, from a period anterior to the treaty of the 22d of February, 1819, between Spain and the United States, his claim having been since confirmed by Congress. He denied that the land claimed from him was embraced in that ceded to the United States by the Caddo Indians; and averred, that through frauds practised by the plaintiff on the government, the Caddos, and the Grappes, the plaintiff, who was the Commissioner on the part of the United States to treat with the Indians, procured the treaty and reservation to the Grappes, and the assignment of their rights to him, all of which he alleged to be, as to him, null and void. He also pleaded prescription, having been in peaceable possession, in good faith and under a just title, since 1817. The final confirmation of the defendant's claim by Congress, during the pendency of this suit, was admitted.

P. A. Morse, and *Roysdon*, for the appellant. A donation, or confirmation of a title by a treaty, is equal to a patent. 9 Peters, 711. The recital in a deed is evidence against the parties, and those claiming under them. 1 Phil. on Evidence, 411. 4 Peters, 83. The recital in the treaty is, therefore, conclusive on the United States, and against the defendant, if he claim under the government. Comyn's Digest, *verbo* Estoppel, B. The recital need not be a copy of the recited act. 3 Johnson's Cases, quoted in 4 Peters, 86.

Fraud in the execution of the treaty can only be complained of by the United States, or the Indians.

Frost and *Olcott*, for the defendant. This is a petitory action, in which the defendant must recover on the strength of his own title. 10 Mart. 293. 8 Ib. N. S. 105. 5 La. 178. Admitting the Caddos to have been the owners of the land claimed by the plaintiff, the original deed of gift should have been produced, or satisfactorily accounted for. 3 Phil. on Evidence, (Cowen & Hill's ed.,) 1236. Greenleaf on Evidence, 93. 6 La. 242. 17 La. 230. 2 Mason, 464. 1 Starkie on Evidence, 369. 11 La. 590. The reservation in the treaty of whatever rights the Grappes may have, is not a substantive grant from the United States to

them. The Caddos never occupied the lands in controversy. They never executed any such deed as the plaintiff alleges. The defendant's title, inchoate at the date of the treaty of 1835, has been since fully confirmed. The fraud practised by the plaintiff has been shown by the evidence. But it has been contended that this was not a question open to examination. As to this, see 2 Mart. 118. 7 Ib. 654. 5 La. 152. 6 Ib. 258. 9 Peters, 734. 15 Peters, 518. The defendant having been in the open, undisturbed possession of the premises since 1817, is protected by prescription. 5 Mart. 197. Civil Code, arts. 3442, 3444, 3450, 3451. 1 Troplong, 634.

BULLARD, J. The plaintiff alleges, that by a treaty made and entered into between the United States and the Caddo tribe of Indians, on the 1st of July, 1835, the boundaries between them were recognized and established, and the lands lying within the said recognized limits of the Caddo tribe, were ceded by them to the United States. That by supplementary articles to said treaty, entered into, and signed on the same day, there were given, granted, and reserved unto the heirs and legal representatives of François Grappe, and to Jacques Grappe, Dominique Grappe, and Balthazar Grappe, four leagues of land, to them and their heirs forever, the said land to be taken out of the land thus ceded, to be laid off in one body in the south east corner of the ceded land, bounded by Red River four leagues, and by the Pascagoula bayou one league, running back for quantity from each, so as to contain four square leagues of land. That the said treaty and supplementary articles were duly accepted and ratified by the President of the United States, by and with the advice and consent of the Senate. That the heirs and representatives of François Grappe, and the other Grappes, in whose favor the reservations had been made, sold and conveyed to the petitioner, all the said four square leagues of land; and that said leagues of land have been located according to the treaty, and are situated on the right bank of Red River, in the parish of Caddo. He further represents, that Samuel Norris, notwithstanding his knowledge of the petitioner's rights, has illegally entered upon 640 acres of the said land, and refuses to give it up, to the petitioner's damage, ten thousand dollars. He, therefore, prays that Norris may be cited,

Brooks v. Norris.

and that the plaintiff's title may be recognized and established by a judgment of the court, and the said Norris evicted from the land, and compelled to restore possession; and that he may pay the damages aforesaid.

The defendant, by his answer, denies that the land claimed from him is comprehended in that, said to be ceded to the United States by the Caddo Indians, or in that, said to have been reserved for the Grappes.

He further answers, that he is the rightful owner of the land claimed from him, having, at and before the date of the treaty between Spain and the United States, of the 22d February, 1819, been in possession, occupancy, and cultivation, and that he has duly proved his title or claim before the proper officers, in pursuance of the laws of Congress; and that he has been in good faith and under a just title, in peaceable possession ever since the year 1817.

He further says, that the Caddo Indians never ceded to the United States, or reserved to the Grappes, or ever had any title or interest to, or in the land described in the petition; nor had the Grappes, nor did they claim to have any title, or interest, until after the treaty; and that the Indians never were the owners of the lands ceded by the treaty. The defendant expressly charges, that through gross frauds and impositions, practised upon the government, the Indians, and the Grappes, the plaintiff, who was himself the Commissioner on the part of the United States, to treat with the Indians, procured first, the treaty and reservation to the Grappes, and then the assignment to himself; and that the whole is, therefore, null and void.

Thus the case presents a question of title in Brooks to lands said to have been reserved for the Grappes, in the treaty negotiated by Brooks himself, with the Caddo Indians; the defendant alleging that the land never belonged to the Indians, that they never made any grant of it to the Grappes, and that the whole was a fraudulent contrivance by Brooks himself, with a view to private speculation.

The reservations in favor of the Grappes are contained in certain supplementary articles, which appear to have been agreed to on the same day, but were not known even to the witnesses to the

treaty, and appear to have been kept secret, under various pretexts, such as that there were other persons who expected reservations, and who would be disappointed, and that it was unparliamentary to let them be read, even by the witnesses to the treaty.

The first supplementary article recites, that "whereas the said nation of Indians did, in the year 1801, give to one François Grappe, and to his three sons then born, and still living, named Jacques, Dominique, and Balthazar, for reasons stated at the time, and repeated in a memorial, which the said nation addressed to the President of the United States in the month of January last, one league of land to each, in accordance with the Spanish custom of granting lands to individuals. That the chiefs and head men, with the knowledge and approbation of the whole Caddo people, did go with the said François Grappe, accompanied by a number of white men, who were invited by the said chiefs and head men to be present, as witnesses, before the Spanish authority at Natchitoches, and then and there did declare their wishes touching the said donation of land to the said Grappe, and his three sons, and did request the same to be written out in form, and ratified and confirmed by the proper authorities according to law, &c. It is agreed, that the legal representatives of the said François Grappe, deceased, and his three sons, Jacques, Dominique, and Balthazar Grappe, shall have their right to the said four leagues of land reserved to them, and their heirs, and assigns forever. The said land to be taken out of the lands ceded to the United States by the said Caddo nation, as expressed in the treaty to which this article is supplementary. And the four leagues shall be laid off in one body, in the south east corner of their lands ceded as aforesaid, and bounded by the Red River four leagues, and by the Pascagoula bayou one league, running back for quantity for each, so as to contain four square leagues of land, in conformity with the boundaries established, and expressed in the original deed of gift, made by the said Caddo nation of Indians to the said François Grappe, and his three sons, Jacques, Dominique, and Balthazar Grappe."

The next article provides for a small reservation in favor of Edwards; and it is then agreed, that if the supplementary articles

should not be ratified, that circumstance should not invalidate the treaty itself.

The first question of law, which presents itself, at this stage of our inquiry, is, whether the plaintiff, in making out his title as the assignee of the Grappes, and which, in common with all plaintiffs in actions of this kind, he is bound to show, may rely upon the treaty alone, and the recitals therein contained, or whether he is compelled to go further back, and produce, or satisfactorily account for the written donation from the Indians to his vendors. Leaving out of view for the moment, and reserving for future consideration, the question whether the treaty may be construed as a substantive grant from the government, independently of the original donation which is recognized as having taken place in 1801, and looking upon the question as one between the plaintiff, the Indians, and the defendant, it appears to us to resolve itself into the question, whether such a recital in a recognitive act, dispenses the party claiming title under it, from producing the primordial title, that is, the original donation in writing, which is said to have been made in 1801. The treaty is, as it relates to the Indians, a mere recognitive act, expressing their intention not to cede to the United States, but to reserve to the Grappes, the four leagues as described in the written act of donation to them.

According to Dumoulin and Pothier, as well as a formal article of the Civil Code of this State, recognitive acts do not dispense with the exhibition of the primordial title, unless its tenor be therein specially set forth. Those authors distinguish between recognitive acts, or acknowledgments, which are in the form which they call *ex certa scientia*, and those *in forma communi*. The former, said to be *in forma speciali et dispositiva*, are those in which the primordial title is set forth. They have this peculiarity, that they are equivalent to the original title in the event of its loss, and prove its existence against the person making it, and they dispense with the production of the primordial title. On the other hand, recognitive acts, *in forma communi*, are those in which the tenor of the primordial title is not set forth. "These acknowledgments," says Pothier, "serve only to confirm the primordial title, and to interrupt prescription, but they confirm the original title only, so far as it is true; they do not prove its

existence, and they do not dispense with its production." 2 Pothier on Obligations, 742, 743. Civil Code, art. 2251.

Such is believed to be also the rule of evidence at common law. Where the recital in a deed points to higher evidence in the power of the party, the withholding of which creates suspicion of an intended fraud or unfairness, the party will be held to account for the non-production of the higher evidence, before the recital can avail him. 3 Phillips on Evidence, 1236. Greenleaf on Evidence, 93.

But not only is the pretended deed of gift of 1801 not produced, nor accounted for; but it is not to be believed that any such gift ever took place. In the first place we know, as a part of the history of the country, that the place where the Caddos lived at that time, was within the jurisdiction of Nacogdoches, in the then Spanish province of Texas, which was under the government of the Captain General of the internal provinces; and that any matter of that kind would have been transacted either at Nacogdoches, or at San Antonio de Bexar, the capital of the province, where the public archives were kept. In the second place, it is equally well known, and satisfactorily proved in the record, that the Caddo tribe of Indians were never recognized as the proprietors of any lands, either by the Spanish or American governments. It is known to us judicially, as a part of the jurisprudence of Louisiana, as well as other dependencies of Spain on this continent, that that power never acknowledged any primitive title in the Indian tribes, but that they were only entitled to hold such small allotments of about a league round their villages, as the government thought fit to grant them. 5 Mart. 655, 490. 6 Ib. N. S. 357. Nor did the American government, the successor of Spain, ever recognize the Caddo tribe, as the owners of any lands within the limits of Louisiana. The Secretary of War who was in office at the date of the treaty, (Cass,) in answer to a communication from the member of Congress then representing this district, says: "I cannot find that the government of the United States has ever recognized any claim of the Caddo Indians to a definite portion of the State of Louisiana, and my impression is, that no country was actually assigned to them by the Spanish government; and this impression is confirmed by the fact, as I understand it, that settlements

Brooks v. Norris.

have been made, and claims acquired by white persons, without any regard to definite boundaries. When the appropriation was last year made for holding a treaty with these Indians, the question respecting their rights came before me for consideration. It was found, on examination, that there were no documents showing any portion of the country to which they were actually entitled. The Commissioner was, therefore, instructed to procure from them a cession of their right of *occupation*, of the district in which they resided." House Doc. No. 1035, 2 Session, 27th Congress; (in the record in this case by consent.)

But let the claim of the Caddos be what it may to the land occupied by them, it is abundantly shown, by evidence in the record, that they never occupied, and never claimed that part of the territory pretended to be ceded, in which the settlement and confirmed claim of Norris is situated, to wit, Rush Island, or *L'Isle des Prêles*, which is formed by Red River, Bayou Pierre, and Pascagoula Bayou; and that they never pretended to have any possessions to the east of the Bayou Pierre branch of Red River. The lands embraced in these reservations are among the most fertile in the valley of Red River. There is no evidence that the Indians ever hunted over them, although they appear sometimes to have turned their horses on them, during the winter, to feed upon the rushes. Brooks himself, the Commissioner, and the plaintiff in this action, while acting as Indian agent, knew of the settlements of Norris, and many others on the Island, and so far from ever objecting to their residing there as within the Caddo lands, he assisted one of them in building his house.

But if the Indians do not appear to have known of their having any claim to Rush Island, the Grappes were equally ignorant of any grant to them as far back as 1801, and even of the reservation in the treaty in their favor, until propositions were made to them by the negociator of the treaty to purchase their pretensions. The conduct of the plaintiff, while negotiating the treaty, was singularly mysterious. The supplementary articles were kept secret even from one, at least, of the witnesses to the treaty, and there is no evidence that those articles were ever read to the Indians, in the hearing of the witnesses.

If, therefore, we regard the Caddo Indians as the grantors of

the Grappes, under whom the plaintiff holds, we think it very clear, that they have shown no title. They have failed to show any donation in 1801, and the Caddos are not shown to have been owners of the land. They were not treated with as *owners*, but merely as *occupants*. The object of the treaty was merely to induce them to remove. Such appear to have been the instructions given to the Commissioner, according to the statement of the Secretary of War; nor is it contradicted by the terms of the treaty, the second article of which stipulates, that the Chiefs, &c., of the said nation, do voluntarily relinquish their possession of the territory of land aforesaid, and promise to remove out of the boundaries of the United States, &c.

But it is contended, that the Grappes acquired the title of the United States by virtue of the reservation in the treaty, and that the treaty is their title, and equivalent to a patent. We do not so understand the treaty. The treaty after reciting a donation made in 1801, with the approbation of the Spanish government, and which had been reduced to writing, of four leagues of land to the Grappes, goes on to stipulate, that the said Grappes "*shall have their right to the said four leagues of land reserved for them, and their heirs for ever.*" This amounts certainly to nothing more than a confirmation of such grant as the Indians may have made, in 1801, to the Grappes, and not to a substantive grant from the government. We are of opinion, that the government is not concluded by the recital by the Indians in the treaty, that they had made a grant in writing in 1801; and that recognition of a previous grant cannot be more conclusive upon the government, than it is upon the Indians. If no such primitive grant exists, then nothing was reserved, and it is clear the United States acquired no new title by the treaty.

This view of the character of the reservation is supported by considering the different expressions used in reserving, in the same treaty, a section of land to Larkin Edwards. No previous grant to him by the Indians is recited; but in consideration of his long services to them, his age, and incapacity to labor, it is declared, that there shall be reserved for him, his heirs, and assigns for ever, one section of land, to be selected out of the ceded lands.

Here we find terms of present grant, and not the mere recognition of a previous deed of gift in writing.

That the Grappes should have been for more than thirty years the owners of more than thirty thousand acres of land by the bounty of the Caddos, without ever knowing it, or apparently dreaming of it, appeared to the jury, who tried this cause, to surpass all belief.

Before we proceed to notice the bills of exceptions to which our attention has been called, it is proper to examine the title of the defendant to the 640 acres claimed by him.

It appears, that Samuel Norris settled in 1817, on Rush Island, within the limits of the State of Louisiana, although at that time commonly known as the Neutral Territory, between the Arroyo Hondo and the Sabine, to which the land laws of the United States had not been extended. This was two years before the treaty of limits between Spain and the United States. It is true, that that treaty created no change in that part of Louisiana, which was clearly embraced within the treaty of cession of 1803, and had been recognized by Congress as early as 1811, as forming a part of the territory of Orleans, and which was then created into a State. But no provision had been made by law for such residents within the neutral ground, as might have obtained from the authorities of Texas inchoate titles to lands, or made improvements with the expectation of receiving ultimately a grant for lands. In 1823, Congress established a Board of Commissioners to inquire into such cases within that region. Norris then came forward, and proved his claim as a settler, and his claim was included in the list of those which were recommended for confirmation. When other similar claims were afterwards confirmed by Congress, that of Norris, and a few others, were suspended, until it could be ascertained whether it was or was not within the Indian boundaries. But it is now admitted, that during the pendency of this suit, his claim has been finally confirmed and ratified by Congress. Norris never was considered, or treated, as an intruder upon the Indian land, and there is nothing to induce the belief, that the government, in treating with the Indians, in 1835, with instructions to their Commissioners, to procure from the Indians a cession of their "*right of occupation*

of the district in which they resided," intended to destroy the right of Norris, and give the land to the Grappes.

We now proceed to examine the bills of exceptions taken during the progress of the trial. The first, was to the admission of certain depositions of witnesses, notwithstanding the objection, that the defendant could not go behind the treaty to prove fraud in any person; and upon the ground, that if there was fraud in the treaty, the government alone can allege and attack it; and upon the further ground, that the government having, in the treaty, recognized the boundary of the Caddo lands, the defendant has no right to prove, that the land was located by the treaty and the Surveyor General, out of the Indian territory. But the depositions were admitted to go to the jury, on the ground, that the parties had consented to read the depositions, instead of examining the witnesses, *viva voce*, and that they might prove the same facts as the witnesses in person might prove, if present. The court did not err. According to our view of the parties, and the peculiar circumstances of the case, Norris, with a title emanating from the government, had a right to go into the questions of fraud, of Indian title, and of boundaries, and to show the nullity of the plaintiff's title by competent evidence.

The second bill, is to the admission of the two Poriers as witnesses, who had been objected to on the ground, that suits were pending against them, brought by the same plaintiff for other tracts of land, claimed under the same title, and that they had set up the same defence.

The court did not err in ruling that the objection went not to their competency, but to their credibility. They were interested in the *question* involved, but not in the *case*.

The last bill, is to that part of the charge to the jury, in which the Judge told them, in substance, that the right of the United States to the Neutral Territory, was recognized by Spain, by the treaty of 1819; that Congress, proceeding to legislate concerning land claims within that territory, by act, in 1824, directed the Commissioners appointed to examine claims, to report those of settlers who had occupied, and cultivated land before the date of the treaty, and continued to do so, in the third class if in their opinion said claims ought to be confirmed; that the title set up

Brooks v. Norris.

by Norris, being reported in the third class, and recommended for confirmation, and it appearing, by the act of 1828, that those claims were only suspended on one point, to wit, until it should be ascertained whether those lands were within the Caddo boundary, whether the government has ascertained that fact or not, the jury might examine the evidence and ascertain it to their own satisfaction, so far as to enable them to decide this case; and that if they were satisfied that Norris was there before the 22d February, 1819, and had complied with other requisites of the act of 1824, and that the Indians, in their opinion, had not been in any kind of possession of Rush Island, down to the time the act of Congress passed, then he was of opinion, that Norris must be considered as having a right to his land, superior to that of the plaintiff derived from the Grappes; that his right rested on the custom of the former government; that the admission in the treaty of 1835, that Rush Island was within the Indian limits, is only binding on the government, and those who would claim rights under it after the date of the treaty, but is not conclusive upon those who had previously acquired rights; in other words, that the admission is not to have a retro-active effect. This charge does not differ materially from the views which we have just expressed, as to the character of the treaty, and the title of Norris, and his right to go behind the treaty and show, that the whole proceeding was, as to him, fraudulent and void. There was nothing in it calculated to mislead the jury, although we are not prepared to assent to the Judge's proposition, that the title of the settlers within the Neutral Territory, rested on any custom, or usage of the government of Spain, or that they had acquired any title to, or in the soil, independently of the act of Congress by which their titles were confirmed. Under these instructions, and with such evidence before them, the jury found a verdict for the defendant, which the court below refused to set aside, on a motion for a new trial. We are not satisfied that it is our duty to disturb it.

Judgment affirmed.

JAMES S. BERRYMAN v. CHARLES G. DAHLGREN.

Where a witness has not been interrogated in the inferior court as to his means of knowing a signature to which he testified, no objection to the want of a disclosure of such means, can avail after appeal.

APPEAL from the District Court of Concordia, *Willson, J.*

Shannon and Poindexter, for the plaintiff.

Stockton and Steele, for the appellant.

MARTIN, J. The plaintiff states himself to be the owner of a judgment obtained in the District Court for the Parish of Carroll, by Ferriday & Co., against Holmes, which was transferred by the plaintiffs to Milton, and by the latter to the present plaintiff; that, notwithstanding this transfer, the said judgment has been seized at the suit of one Dahlgren against the original plaintiffs. On this statement an injunction was obtained, to prevent the sale of the judgment at the suit of Dahlgren.

The defendant denies the right of the plaintiff, under the transfer to Milton, and that of the latter to him. The injunction was made perpetual, and the defendant has appealed.

There is no written evidence of an actual transfer from the original plaintiffs to Milton; but there is a document attesting the transfer of the judgment by Milton to the present plaintiff; and there are a number of letters attesting and corroborating his transfer to the plaintiff. But the defendant and appellant has complained, that the signature of Milton to the transfer, and to the letters which purport to be his, is only proved by a witness, who does not inform us of the grounds on which his knowledge of the signature rests; nor whether he has ever seen that gentleman write, or ever received any document clothed with his signature, whereby the genuineness of those affixed to the acts of transfer, and letters, may be tested. If the party who seeks to avail himself, in this court, of a chasm in the evidence, thought that his doing so would have been available, at all, he ought to have interrogated the witness, in the lower court, as to his means of knowledge.

The evidence of the transfer of the judgment by the original plaintiff who obtained it, appeared to the Judge below perfectly

Beaumont and another v. Covington.

atisfactory, and we are not able to say that he erred. It is shown that notice was given to the debtor, of the first transfer to Milton, but not of his transfer to Berryman. This, in our opinion, suffices ; because by the first transfer duly notified, the debt ceased to belong to Ferriday & Co., and, consequently, could not be seized by their creditors.

Judgment affirmed.

FRANKLIN BEAUMONT and another v. LEVIN COVINGTON.

A receipt from the Receiver of Public Moneys for the price of lands purchased from the United States, is sufficient evidence of title to enable the purchaser to maintain an action.

The possession of an agent, is the possession of the principal.

A curator *ad hoc*, may be appointed to represent an absent defendant in a petitory action, as in any other. Art. 116 of the Code of Practice, does not limit the right of appointment to any particular class of actions.

Where a curator *ad hoc*, is a sworn attorney, he will be presumed to have done his duty. So where a second curator *ad hoc*, has been appointed, *pendente lite*, it will be presumed that the first appointment was vacated, by death, or otherwise.

APPEAL from the District Court of Concordia, Tenney, J.
Stacy, for the plaintiff.

Elam, for the appellant, assigned as errors apparent on the record : 1st. That the action, being a petitory one, should have been against the person in actual possession ; and that, if no one was in possession, no action of this kind could be maintained. Code of Practice, arts. 43, 964. 2d. That a defendant cannot be represented in a petitory action by a curator *ad hoc*, such appointments being restricted to personal actions only. Civil Code, art. 59. Code of Practice, arts. 43, 116. 3d. That it does not appear from the record, that the curator was sworn, as required by law. Civil Code, arts. 52, 54, 295. 9 La. 276. B. & C's Digest, p. 611, act of 1834. 4th. That it does not appear for what reasons a second curator *ad hoc*, was appointed ; nor that the latter ever was sworn, or appeared, or that there was a judgment by

default, or such a *contestatio litis* as is required to support a legal judgment. Code of Practice, arts. 120, 361. 11 La. 360.

BULLARD, J. The plaintiffs allege, that they are joint owners of a tract of land in the parish of Concordia, composed of Nos. 49 and 50, in Township No. 9, Range 10 east, by virtue of a purchase from the United States; that Covington, who resides in the State of Mississippi, wrongfully took possession, and has possession; and that he has committed waste. They pray that a curator *ad hoc*, may be appointed for the absent defendant, and for process of citation, and that they may be decreed to be the true owners of the said tract of land.

The court accordingly appointed a curator *ad hoc*, upon whom service of citation was made, September 21st, 1839, and who, on the 17th of February, 1840, filed an answer.

The answer denied the allegations in the petition; and particularly, that the defendant was in possession of the land set forth in the petition. The defendant further alleged title to the land occupied by him, in virtue of his ownership of a tract fronting on the river Mississippi, in front of said land, under the act of 1832. He avers, that he had made application to enter said land at the Land Office at Ouachita, and that the Receiver had refused to receive the money, because there was no Register. He further claims for the value of his improvements.

The plaintiffs produced as evidence of title, two receipts by the Receiver of Public Money in that district, for the price of the two lots of land as described in the petition. This, we have often ruled, is sufficient to enable the purchaser to maintain an action.

On the part of the defendant, it is not shown that he has any title whatever; nor does it even appear from the testimony of the Surveyor, that the land lies in the rear of, and contiguous to the front tract, of which he is the alleged owner.

The plaintiffs had judgment for the land, and for five hundred and five dollars damages for fruits, or rents and profits, and the defendant has appealed.

His counsel has contended, that the action being petitory, could be brought only against a person in *actual* possession; and that if it be assumed that no one was in possession, the action cannot be

Beaumont and another v. Covington.

maintained. To this it may be answered, that it was shown that the defendant was in possession and cultivation of the land, that his residence was in the neighboring State, and that one may be in actual possession by means of agents, without being personally upon the land.

It was next urged, that the court could not appoint a curator *ad hoc*, to represent the defendant in a petitory action. It appears to us, that article 116 of the Code of Practice does not limit the right of appointment to any particular class of actions; and when the law does not distinguish, we cannot.

We held in the case of *Cooley v. Seymour*, 9 La. 274, that when the curator *ad hoc*, was a sworn attorney, we would presume he had done his duty.

We will presume that a vacancy had occurred either by death or otherwise, when the court appointed a new curator *ad hoc*, pending the case. The case was at issue before the second appointment; and there was, in our opinion, a regular *contestatio litis*.

Having disposed of these technical objections, we come to consider the question of improvements, and rents and profits.

On the part of the appellee it is contended, that the value of the rent is shown, as well as that of the improvements, and that the difference between them is the judgment of the court below. But the appellant contends, that no allowance was made for his improvements. The evidence in the record does not enable us to say, that the result to which the court came upon a mere question of fact, is so clearly erroneous as to authorize our interference.

Judgment affirmed

ALFRED J. LOWRY, Curator of the vacant succession of Alexander McNeill, v. JAMES ERWIN.

No state court can inquire into any act or judgment of a court of the United States, upon the merits, nor say whether the judgment was rendered upon proper evidence, or is correct; but when the proceedings of a court of the United States are set up as the basis of title, between persons litigating in our own courts, they may be looked into to ascertain whether the court had authority to render such a judgment, whether there is in fact such a judgment, or to ascertain whether the excoctory proceedings under it were legal.

The Marshals of the United States in Louisiana, in executing process, are bound, by an act of Congress, and the rules of the Circuit Court, to conform to the state laws; and when their proceedings form a link in a chain of title set up, the state courts will examine into their legality. A state court cannot direct a Marshal how to act, nor direct process to him to be executed; but when he has acted, and his acts are instrumental in changing the titles to property, they will, between litigants before a state court, be examined into.

Executory process by seizure and sale, is a summary and severe remedy, and the formalities prescribed by law must be strictly complied with, or the property will not be transferred, and the purchaser acquire no title.

To support a sale by a Sheriff or Marshal, under an execution or order of seizure and sale, there must be a valid judgment, by a court of competent jurisdiction; otherwise the title will not be divested. Where there is a total want of jurisdiction, the proceedings are null and void; and the competency of the tribunal may be inquired into.

An officer who executes process issued by a court without jurisdiction is a trespasser, and liable in damages to the party injured.

Under the grants of jurisdiction to the Circuit Courts of the United States, by the 11th section of the act of Congress of 24 September, 1789, those courts are of limited jurisdiction, having cognizance not of cases generally, but only of a few, under special circumstances; and the presumption is, not that a cause is within its jurisdiction unless the contrary appears, but that it is without it, unless the contrary be shown.

Articles 42, 43, 44 of the Civil Code, provide for a change of domicile only as to persons already residents of the state, and not as to those coming from other states. As to them, an actual residence of twelve months within the state, is required, before a domicile can be acquired.

A Circuit Court of the United States is without jurisdiction *ratione personae*, of a suit between parties, all of whom reside out of the State in which the court is held.

The provision of the 11th section of the act of Congress of 24 Sept., 1789, "that the Circuit Courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature," &c., means that where a citizen of the state can sue in the state courts against another citizen or resident, an alien, or a citizen of another state may institute a similar suit in the Cir-

cuit Court of the United States, for a similar cause of action, and that he shall be entitled to the same remedy.

An order of seizure and sale cannot be obtained either from a state court, or a Court of the United States, against mortgaged property composing part of a succession represented by an executor, administrator, or curator, and in the course of administration in a Court of Probates.

A creditor, residing in another state, cannot sue in the Circuit Court of the United States, an executor, curator, or administrator of an estate, in course of administration in a Court of Probates, as an insolvent estate, and obtain judgment, and issue execution thereon in violation of the state laws, and take the property out of the hands of the officer administering it, to the injury of the domestic creditors. But if such executor, administrator, or curator, refuse to admit the justice of a debt claimed by an alien or non-resident, and to class it as an acknowledged debt against the succession to be paid as others, he may be sued in the Circuit Court of the United States, and a judgment liquidating the demand may be obtained; but the judgment must provide that it is to be paid in due course of law, out of the assets in the hands of the executor, &c., to be administered, and no execution can be issued in favor of an alien or non-resident creditor, unless one could be issued, in a similar case, in favor of a domestic creditor.

Until the notice required by art. 735 of the Code of Practice to be given to a debtor, on an application for an order of seizure and sale against mortgaged property, has been given, and the time has elapsed, the order directing the seizure is not a final judgment, and no executory proceedings can be had under it.

A possessor in good faith, under a title which he honestly believes to be just in point of fact and form, is entitled to his improvements, and is not bound to account for the fruits and revenues, until the property is claimed by the real owner. The possession and title must be such as to entitle the party to the prescription of ten years. The possessor in good faith is one who has just reason to believe himself the master of the thing which he possesses, though he may not be so in fact, (C. C. 3414;) the possessor in bad faith, one who knows that he has no title, or that his title is defective. lb. 3415.

A judgment by a court having no jurisdiction or authority to render it, is null and void; and one possessing under it, is not a possessor under a just title and in good faith, so as to exempt him from liability for the fruits and revenues, until claimed by the owner. To exempt him, as a possessor in good faith, from such liability, the possession must have been valid in point of form. C. C. 3452.

A possessor without a just title, owes the fruits and revenues from the commencement of his possession.

The omission of counsel to interrogate a witness as to a particular fact, is no ground for a new trial.

A new trial will not be granted on an affidavit by one of the counsel of a defendant that he had discovered, since the judgment, new and material evidence, of the existence of which he was not aware at the time of the trial, though he had used due diligence, &c., where it is not shown that the defendant, or his other counsel, were also ignorant of the existence of such evidence, and the witness by whom the new fact is expected to be proved was examined on the trial of the cause.

Lowry, Curator, v. Erwin.

APPEAL from the District Court of Madison, Curry, J. The plaintiff, as curator of the vacant succession of Alexander McNeil, alleges, that the deceased owned and was in possession of a tract of land in the parish of Madison, with certain slaves, of the value of \$100,000, producing an annual revenue of \$25,000; and that the defendant fraudulently and collusively possessed himself thereof, and refuses to deliver up the same. The curator prays, that the succession of McNeil may be decreed to be the owner, and be put in possession of the property and the improvements thereon, and that the defendant may be ordered to pay to it, twenty-five thousand dollars a year, counting from June, 1840, till possession shall be restored, for the fruits and revenues thereof.

Erwin, the defendant, answered, that he had purchased the property on the 6th of July, 1840, at public auction, made by the Marshal of the Circuit Court of the United States, for the Eastern District of Louisiana, under an order of seizure and sale in the case of *Andrew Erwin v. Hector McNeil, testamentary executor of Alexander McNeil, deceased*, as appears from the bill of sale annexed to his answer; that he paid therefor, \$16,000 cash; and that he was put in possession thereof, with the exception of certain slaves, by the Marshal. He avers, that he has made permanent improvements on the property, to the value of \$50,000; that the value of the crops, which were made at heavy expense, was much less than alleged by the petitioner; that the purchase was made in good faith, and is valid; and that the proceedings are in full force, no effort having been made to reverse or annul the same. He pleads those proceedings in bar to the present claim. Should the proceedings be declared null, he claims the reimbursement of the price, with interest, and the value of the improvements, before restoring the property. There is a general denial of the other allegations of the petition; and the usual prayer for general relief. The facts in this case are stated minutely and accurately in the opinion of the court, by *Garland, J.* In the lower court there was a judgment for the plaintiff for the land, and for so many of the slaves as were proved to have been received by the defendant; and in favor of the defendant in reconvention, and against the succession of Alexander McNeil, for a small sum, with interest from the date of the judgment, as the

Lowry, Curator, v. Erwin.

balance of the price paid by the defendant for the property over and above the fruits and revenues received by him, and the value of the improvements he had made. From this judgment the defendant took a suspensive appeal.

Stacy and Sparrow, for the plaintiff. The Circuit Court of the United States had no jurisdiction, the maker and original holders and owners of the notes being all residents of Mississippi. The assignee of the notes could not sue, as the original holders could not. Act of 24 Sept., 1789, § 11. 16 Peters, 316. There is no allegation that Hector McNeil is a citizen of this State, and the jurisdiction of the court does not appear from the record. Under such circumstances the court must be presumed to be without jurisdiction. 4 Dallas, 10. 2 Peters' Digest, 579. The order of seizure and sale issued by the Judge, not having been served on the debtor as required by art. 735 of the Code of Practice, could not have been appealed from (15 Peters, 170. 12 Ib. 328;) and the whole proceeding was null and void. 9 Wheaton, 546. 1 Peters, 340. Besides, the will of Alexander McNeill has never been ordered to be executed by the Court of Probates, and Hector McNeil was never confirmed or recognized as executor, according to law. Civil Code, arts. 1637, 1681, 1682. Code of Pract. arts. 924, Nos. 1 and 6, and art. 931. 5 Mart. 572, 649. 5 La. 430. 10 La. 532. The Court of Probates could alone appoint an executor, (12 Wheaton, 175,) and until this was done, there could be no representative of the succession, to be made a party to the proceedings in the Circuit Court.

The state laws provide for the distribution of the property of a deceased person, through the Courts of Probates. This distribution must be made by one court. The Circuit Courts of the United States having no jurisdiction over domestic creditors, could not exercise these powers. Foreign creditors must submit to the mode of distribution adopted by the state tribunals. Code of Pract. arts. 921, 924, (Nos. 5, 7, 8, 9, 13,) 987, 988, 990, 993, 1053, 1054. 2 La. 350. 4 La. 83. The sale of the property by the Marshal was void, for the want of legal notice. Act of Congress of 8 May, 1792, sect. 2. Rules of the Circuit Court of Eastern District of Louisiana, adopted 20 Nov., 1837. Code of Pract. arts. 735, 736. 7 Mart. N. S. 513. 6 La. 631. Civil

Code, art. 2054. The defendant, being legally and morally in bad faith, he must account for the fruits and revenues from the time he came into possession. Civil Code, arts. 493, 1840, (No. 3,) 3414, 3415, 3445, 3447, 3450, 3451. 10 La. 285. 8 Mart. N. S. 525. 2 La. 521. The sale to the defendant was clearly fraudulent and collusive. All the *absolute* nullities in the proceedings in the Circuit Court may be opposed, when these proceedings are relied on by the opposite party as his title. 7 Mart. N. S. 185. 8 Ib. N. S. 246. 3 La. 245, 421. 4 La. 150. 2 Mass. Rep. 150.

Dunbar, Hyams, Elgee, and Bemiss, for the appellant. No State tribunal can inquire into the validity of any act or judgment of a court of the United States, which can only be examined by appeal to the Supreme Court of the United States, or by action of nullity before the court which rendered the decree. 4 Mart. 458. 5 Ib. N. S. 465. 6 Peters, 169. 7 Cranch, 280. 4 Cranch, 333, 434. 2 Peters, 169. 6 Ib. 657. 10 Ib. 477. The courts to which such a judgment may be presented, can only examine into the *competency* of the tribunal which pronounced it. 5 Mart. N. S. 465. 4 Cranch, 268, 294, 333. The Circuit Court was, in this case, competent. The objection that claims against a succession must be brought before the Probate Court, is untenable. See 4 Cranch, 294, 308. 5 Condensed Rep. U. S. 547. 14 Peters, 167. Admitting that the Circuit Court had no jurisdiction over a claim held by a citizen of another State against Alexander McNeil, yet Hector McNeil was the universal legatee of his brother, and, in this view, the proceedings must be considered as between two living persons. Civil Code, art. 1599 *et seq.* The Probate Court of Madison had no right to appoint a curator to McNeil's succession—it was not a vacant one. Civil Code, art. 1088. A dative testamentary executor should have been appointed. Ib. art. 1662. The judgment of the lower court is manifestly erroneous in charging the defendant with rents and profits *from the day of sale*, he being a purchaser in good faith. Civil Code, arts. 3414, 3416. 9 Mart. 349. 11 Ib. 558, 675. 1 Ib. N. S. 290. 2 Ib. N. S. 559. 5 Ib. N. S. 53. 7 Ib. N. S. 328, 360. 8 Ib. N. S. 181, 620. 7 La. 59.

GARLAND, J. The plaintiff, as curator of the vacant estate of

Lowry, Curator, v. Erwin.

Alexander McNeil deceased, alleges, that at his decease, he (McNeil) was the owner, and possessor of a tract of land, with a stock of horses, mules, cattle, sheep, hogs, and aratory utensils attached thereto; that said land is cultivated as a cotton plantation, to which there is attached, a large number of valuable slaves named in the petition, all of which are of the value of one hundred thousand dollars, and produce an annual revenue of \$25,000. He charges, that the defendant, in the month of July, 1840, since the death of said Alexander McNeil, illegally, and by fraud and collusion, and without legal title, took possession of the aforesaid property, and holds it, and has wrongfully converted it to his own use, with all its fruits and revenues, and pretends to be the owner of the same. The plaintiff, therefore, prays for a judgment for the said land and slaves; that as the curator of the aforesaid succession, he may be decreed to be the owner of the same, and put in possession thereof.

The defendant, after a general denial, avers, that on the 6th of July, in the year 1840, he became the purchaser, at a public sale made by the Marshal of the Eastern District of Louisiana, who had seized the property under a writ of seizure and sale, issued on an order or judgment given by the Circuit Court of the United States, for the Ninth Circuit, in the Eastern District of Louisiana. That said writ was issued in the case of Andrew Erwin against Hector McNeil, testamentary executor of Alexander McNeil, as mentioned in the sale from the Marshal, and in the record of the suit annexed. He alleges, that he gave the sum of \$16,000 cash, for the plantation and slaves, which was applied to the payment of a mortgage debt owing by the aforesaid succession to Andrew Erwin; that after the purchase of said property, he (defendant) received possession of the same from the Marshal, in good faith, under the aforesaid title, except certain slaves which are named, which he states, were never delivered. He further avers, that under the title aforesaid, he proceeded to improve the land by clearing a large part of it, and placing valuable and permanent improvements on it, which are worth \$50,000, and have enhanced its value to that amount. He denies, that the crops produced, amounted to the sum stated in the petition, and alleges, that they were made at great labor and expense. He asserts,

that the purchase is good and valid in law ; was made in good faith, and that all the proceedings remain in full force ; that no appeal has been taken from them, nor have they been reversed or annulled. He sets them up as a plea in bar to this suit. He further avers, that if the sale is annulled, and the plaintiff recover the property claimed, he must reimburse to him, Erwin, the purchase money, with interest, and also the value of the improvements, and that he cannot be dispossessed of the property, until the entire payment thereof. He further alleges, that he has sold all of the aforesaid property, and that none of it is in his possession.

The facts of the case are, that on the 8th day of January, 1835, Dawson and Nutt, by an authentic act of sale before the Parish Judge of the parish of Carroll in this State, sold to Alexander McNeil, the plantation and slaves in controversy, they being situated in that parish, now the parish of Madison. All the parties were at the time residents of the State of Mississippi, as appears by the act of sale, and none of them ever were residents of this State. The property was sold for \$105,000, payable in five annual instalments, four of \$25,000 each, and one of \$5,000. All the payments have been made except the fourth, on which it is alleged \$17,500 are due, with interest, from January, 1839. The notes given by Alexander McNeil, to secure the price of the property, were secured by a mortgage in the ordinary form. Alexander McNeil died in Mississippi, about the 28th of May, 1839. By his will, which contains several legacies of small value, he bequeathed the mass of his estate to Hector McNeil, also a resident and citizen of Mississippi, whom he appointed his testamentary executor. On the 6th of June, 1839, this executor, stating himself to be a citizen of Coahoma county, in Mississippi, presented a petition to the Judge of Probates of the parish of Madison, in which, after reciting that his testator had died at the date above stated in Mississippi, and left a will in which he was appointed sole executor and principal legatee, an unauthenticated copy of which was annexed to the petition, he proceeds to state, that two large estates were in the possession of his testator situated in that parish ; that, by the laws of Mississippi, as executor of the will, he is bound to present it for probate in Warren county in that State,

without delay ; but as the court would not sit for some weeks, he could not then have the will proved and recorded nor could he then present a duly certified copy of it, to be recorded in the said Probate Court of Madison. He avers, that " he is desirous of taking on himself the succession of his deceased brother's estate, according to the terms of his last will and testament, and the laws of this State ; he therefore prays, that an inventory of all the property in the parish, belonging to the estate of said Alexander McNeil, deceased, be taken ;" and he prays, the Judge to grant him the succession of the deceased Alexander McNeil, according to the terms of the will and the laws of the State ; and that he will grant any other, and whatever order may be necessary, to entitle him (Hector McNeil) to the possession, and succession of the property left by the deceased. Upon this petition no order or judgment was given by the Probate Judge ; but, on the 2d of July following, he proceeded to make an inventory of the property composing Alexander McNeil's succession, which is signed by Hector McNeil, as executor. The will was probated in Warren county, Mississippi, on the 24th of June, 1839, and a copy of it, and of the proceedings in the aforesaid court, were recorded in the Probate Court of Madison, on the 1st of July, 1839, one day before the taking of the inventory, but no order was taken on it, further than to record it. On the 1st of November, 1839, Hector McNeil made a declaration before the Parish Judge of the parish of Madison, stating, that he is the owner of large possessions in said parish, consisting of lands, slaves, &c. ; that he is desirous of acquiring residence, and to be entitled to the privileges of a resident of the State. He states his age ; that he is from Mississippi, and desires to pursue the business of planting, and to reside in, and make that parish his permanent domicil and home ; wherefore he prays, that his notice may be filed. The parol evidence shows, that Hector McNeil has a family who have constantly resided in Mississippi, and that he never resided personally in the parish of Madison, or State of Louisiana, only making occasional visits to the plantations in Madison.

On the 23d of May, 1840, Andrew Erwin, a resident of Tennessee, presented his petition to the Circuit Court of the United States, for the Eastern District of Louisiana, stating that he was

the holder of two of the notes given to Nutt and Dawson, due in January, 1839, on which \$17,500, with ten per cent interest thereon are due, with costs of protest. He alleges, that those notes were given to secure a part of the price of the plantation and slaves sold as aforesaid, and were included in the mortgage stipulated in the sale. He avers, that Hector McNeil, testamentary executor of Alexander McNeil, is indebted to him in the amount due on said notes, which said Hector McNeil, it is alleged, resides in the parish of Madison; wherefore an order of seizure and sale is prayed for, commanding the Marshal to sell the plantation and slaves mentioned for the purpose of paying the aforesaid sum with interest and costs. On the day that this petition was filed, the District Judge of the Eastern District of Louisiana, not in open court, and signing himself "P. K. Lawrence, U. S. Judge," made an order in these words: "Inasmuch as the mortgage within mentioned, imports a confession of judgment, let an order of seizure and sale issue, for the sale of the property mortgaged, if the sum within claimed is not paid, after legal notice—New Orleans, May 23d, 1840." On the same day, the order of seizure and sale was issued by the Clerk, commanding the Marshal to seize and sell the plantation and slaves, which are specially described, after legal demand for cash, to satisfy the aforesaid demand. This writ went into the hands of the Marshal on the 25th of May, and on the 29th of the same month, he delivered the order of court and copy of mortgage to the defendant; also, a notice directed to Hector McNeil, testamentary executor of Alexander McNeil, in which it is stated, that the sum \$17,500, with interest as claimed, is demanded of him, and that if, at the expiration of three days, the same is not paid, that the order of seizure and sale will be executed, and the plantation and slaves sold under it. The sum was not paid, and on the 1st of June a seizure was made of the plantation and fifty-seven slaves, which were, on the fourth of June, 1840, advertised for sale on the 6th of July following. Hector McNeil was notified of the seizure and day of sale, and the Marshal states, that he affixed advertisements at the doors of the court house, and Parish Judge's office, and other places in the parish, but these places are not named, and no proof exists of any advertisements at any other

places than those named. Appraisers were appointed, who appraised the land at \$13 per acre, and the slaves at various prices, making altogether the sum of \$23,845, and they were adjudicated to the defendant for \$16,000 cash, and the Marshal made him a sale. It does not appear, that any money was paid by the purchaser; but William M. Beal, whom the Marshal calls the agent of the plaintiff, Andrew Erwin, gave him (the Marshal) a receipt for the sum, and he made a deed of sale, in which he omits to state, that the price bid by the defendant had been paid. Under this sale, the defendant claims the property. It is here proper to state, that the land which was, on the 6th of July, 1840, appraised at \$13 per acre, was on the 1st of July, 1839, when Hector McNeil, as executor, had an inventory made, appraised at \$50 per acre; and it is also proved, that about 400 out of 640 acres, are cleared; and that it is worth from \$35 to \$40 per acre to clear such land. Nothing seems to have been allowed for stock and improvements by the appraisers. The slaves were appraised in July, 1840, for about half what they were in July, 1839. It is further to be noticed, that no explanation is given how these notes got into the hands of Andrew Erwin, in Tennessee. No transfer of the mortgage was made to him; without which, no Judge of a state court could have granted an order of seizure and sale, without a violation of law. The parol evidence shows, that besides the slaves mentioned in the sale to the defendant, there were thirty-two or three, more slaves on the plantation, who possibly belonged to the defendant. The overseer on the plantation speaks of there being generally from seventy-five to eighty-five hands on the place. One of the appraisers at the Marshal's sale, had been McNeil's overseer on the place, from 1835, to July or August, 1839. He says, that he knew all or nearly all the slaves purchased from Dawson and Nutt, yet thirteen mentioned in the order of seizure are stated not to have been found. Another witness, who was an overseer for Hector McNeil, says, that in the year 1840, six hundred and twenty-five bales of cotton, of 400 pounds each, were made on the whole plantation. In 1841, there were 488 bales, of four hundred pounds each, made. In 1842, he thinks there was not more than 350 bales of the same weight. It is also in evidence, that the price of cot-

ton for the crop of 1840, was about an average of ten and a half cents. For the crop of 1841, an average of eight cents; and for that of 1842, about six cents. The place purchased by the defendant adjoined other lands, which it seems all formed one plantation. The expense of the plantation in 1840, was not less than \$5,000; in 1841, about \$6,000; and in 1842, about 4,000. Since the sale, about ninety acres of land have been cleared on the tract purchased by the defendant. Nine negro houses, four cisterns, two corn cribs, a stable and corn mill, have been built, the whole worth \$2800; and it is worth from \$35 to \$40 per acre, to clear the land, as the ninety acres have been cleared. It is also proved, that from New Orleans to the parish of Madison, is about 430 miles; and it is further shown, that neither Alexander McNeil, nor Hector McNeil, ever had an actual residence in the parish of Madison. One witness says, that he had known both of them from the year 1833; that Alexander McNeil was a citizen of Mississippi to the day of his death; and that Hector McNeil was always a citizen of that State. The overseers who were on the plantation say, that Hector McNeil never lived on it; that in 1839, and 1840, he lived with his family, a part of the time in Vicksburgh, and the remainder near Warrenton, Mississippi, on a plantation he had there. The defendant offered in evidence all the proceedings relating to the order of seizure and sale, and the Marshal's deed, and also offered the petition of Hector McNeil addressed to the District Court, in and for the parish of Madison, praying for an injunction against the New Orleans Exchange and Banking Company, for the purpose of showing, that in that petition he stated himself to be a citizen of Louisiana. He commences it: "The petition of Hector McNeil, testamentary executor of the last will and testament of his brother Alexander McNeil, of said parish and State," &c. In no part, is it stated, that he is a citizen of Louisiana. This petition was filed on the 16th of July, 1840, ten days after the Marshal's sale. In it, he states, that the succession of Alexander McNeil owes many large debts; that he (Hector) is administering the succession, under the order of the Court of Probates of the parish of Madison, where the will of his testator is recorded, and he confirmed as executor; that the Exchange Bank of New

Lowry, Curator, v. Erwin.

Orleans sets up a large claim, pretended to be secured by mortgage, and had, on the 18th of May, 1843, obtained an order of seizure and sale against him, whether as executor or universal heir he does not say, and that the Sheriff had seized a number of slaves and advertised them for sale, all of which he alleges to be illegal. He states, that the District Judge of the Ninth District, had no jurisdiction, or authority, to issue an order of seizure and sale in favor of said Bank, the succession being in a course of administration; and further, that the notes secured by the mortgage are not payable to the said Bank, but to other persons, who have endorsed them, and that there is no authentic transfer of the mortgage from the original payee to the said Bank, without which no order of seizure and sale could be legally issued. We thus see, this executor on the 6th of July, 1840, standing quietly by, and permitting a large part of the property of the succession he was administering, to be sold at a ruinous sacrifice, under the order of seizure and sale under which the defendant claims, in which the very defects he sets forth in this petition exist. He did not complain *then*, that no injunction was asked for; but a few days after, against another large creditor, he is vigilant in defence of the rights of the succession.

We have stated the facts of the case fully, and from them we have strong grounds to believe, that there was collusion between the parties to the sale, under which the defendant claims.

Upon the pleadings and evidence, the District Judge gave a judgment in favor of the plaintiff, for the land and slaves. He annulled the sale made by the Marshal, and decreed the defendant to account for the crops of cotton made in the years 1840, 1841, and 1842, which, after deducting the expenses of the plantation, and the value of the improvements made by the defendant, produced an amount nearly sufficient to repay him the price he alleged, that he had paid for the whole property. This sum the Judge compensated against the price so far as it extinguished it, and gave the defendant a judgment for the remainder, from which judgment he has appealed.

In this court, the counsel for the defendant calls our attention to the exceptions set up in the answer, in relation to the jurisdiction of the court that tried the cause. He avers, that no State

tribunal can question, or inquire into the validity of any act or judgment of a court of the United States, and that such an act or judgment can only be inquired into, on appeal to the Supreme Court of the United States, or by a direct action of nullity before the tribunal which rendered the decree. We admit, that neither this tribunal, nor the inferior courts, can revise a judgment of the United States Court, upon the merits. We cannot say whether it was rendered upon proper evidence, or is correct in itself; but we do not say, and have so decided recently, that when the proceedings of the Federal Courts are set up as the basis of title, between persons litigating in our courts, that then we will look into their proceedings, for the purpose of seeing whether they have jurisdiction or authority to render such judgment or decree; whether there is such a judgment; and also for the purpose of ascertaining, whether the executory proceedings under it have been conformable to law. *Garrard, Executor, and others v. Reed*, 5 Robinson, 506.

The second exception is, that a state tribunal, cannot annul or inquire into the acts of a Marshal of the United States, when acting under the authority of a decree of the United States Court, when such acts are only voidable, not void. Upon this point, and the one first stated, the counsel for the defendant have not furnished us with satisfactory authorities. We have recently considered the subject in the case just cited, and have come to a different conclusion. The Marshals of the United States in Louisiana, in executing the process of their courts, are bound to conform to the State laws, by an act of Congress and the rules of the Circuit Court; and when their proceedings form a link in the chain of title set up, we are bound to examine into the legality of them. A state court cannot direct a Marshal how he shall act, nor send process to him to be executed; but when he has acted, and his acts are instrumental in changing the title to property, then, between litigants before our courts, we will examine whether his acts have legally effected that object.

It is well settled, in our jurisprudence, that in forced alienations of property, there must be a reasonable diligence and a compliance with the forms of the law, under the penalty of nullity. When a party resorts to the summary and more severe remedies

allowed by law, he is then held to a stricter compliance with every legal formality; and the executory process of seizure and sale, may be considered as one of severity. It is obtained *ex parte*, and all the proceedings under it are to be scrutinized closely. It necessarily follows, that if the law has not been complied with, the property is not transferred, and the purchaser acquires no title. 11 Mart. 607. 9 La. 542. 6 La. 623. It is equally well settled, that to support a sale made by a Sheriff or Marshal, under an execution or order of seizure and sale, there must be a valid judgment rendered by a court of competent jurisdiction, without which the title is not divested. 3 Robinson, 120. An officer who executes process issued by a court which has no jurisdiction, is a trespasser, and liable in damages to the party injured.

In 13 La. 431, it is said, if there is a total want of jurisdiction, the proceedings are null and void, and confer no title. 1 Peters, 340. 2 Peters, 157. It is, in fact, not denied, that we can inquire into the *competency* of the tribunal which rendered the judgment that caused a seizure and sale of the property.

The first question is, had the Circuit Court of the United States jurisdiction over the persons, or subject-matter, in granting the order of seizure and sale; and the second, was there such a judgment as authorized the sale in question. The third question will be, have the formalities of the law been complied with by the Marshal.

The 11th section of the judiciary act of 1789, (Ingersoll's Digest, 370,) says: "The Circuit Courts shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law, or in equity, where the matter in dispute exceeds, exclusive of costs, the value of five hundred dollars, and the United States are plaintiffs, or petitioners; or an alien is a party; or the suit is between a citizen of the State where the suit is brought, and a citizen of another State. Nor shall any District, or Circuit Court, have cognizance of any suit to recover the contents of any promissory note, or other chose in action, in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents if no assign-

ment had been made, except in cases of foreign bills of exchange." Under this grant of jurisdiction, the Supreme Court of the United States has said, that the Circuit Court is one of limited jurisdiction, and has cognizance, not of cases generally, but only of a few specially circumstanced; amounting to a small portion of the cases, which an unlimited jurisdiction would embrace; and that the fair presumption is not, as with regard to a court of general jurisdiction, that a cause is within its jurisdiction, unless the contrary appears; but rather, that a cause is without its jurisdiction, unless the contrary appears. 4 Dallas, 8. 1 Cond. Rep. 205. It will, therefore, be seen, that the presumption of law is against the power to issue the order of seizure and sale.

In order to take jurisdiction over the parties to the original suit, the defendant must have been a citizen of this State. The act of mortgage under which Andrew Erwin proceeded, shows, that Alexander McNeil, was a citizen of Mississippi, and the parol evidence proves, that he resided there to the day of his death. His will was probated there, and a copy of it presented to the Parish Judge of Madison, as a foreign testament, and recorded and acted on as such. The first we hear of Hector McNeil is, his petition to the Parish Judge of Madison, in which he, in terms, states himself to be a citizen of Coahoma County, in the State of Mississippi. We see no intention manifested to become domiciliated in Louisiana, until the declaration made in November, 1839. That declaration did not give him a domicile in the State. In the case of *Boon v. Savage*, 14 La. 169, we said, that articles 42, 43, 44, of the Civil Code, only provide for a change of domicile by persons already residents of the State, and not by those coming from other States. As to them, the law requires an actual residence of twelve months in the State, before a domicile is acquired; and we therefore maintained an attachment against *Savage* as a non-resident. His case is precisely similar to that of Hector McNeil. He had made the declaration of intention, and given notice before the Parish Judge; he had a plantation in the State, but the evidence showed, that he generally resided in Mississippi. This doctrine we have since confirmed in a case in the Eastern District. Vide B. & C's Digest, p. 286, 287. The parol evidence

in the case, completely negatives the idea, that Hector McNeil was ever a citizen of, or had a domicile in Louisiana. The statement that he was so, in the petition presented to the Circuit Court in New Orleans, was, therefore, a fraud, and his acquiescence in it proof of his participation in it. It was impossible for him to have acquired a domicile, even if he had manifested his intention more strongly than he did. The Circuit Court was, therefore, without jurisdiction *ratione personæ*.

Had the Circuit Court jurisdiction *ratione materiæ*? We have shown that the presumption of law is against it. The judiciary act quoted, declares, that the jurisdiction is "concurrent with the courts of the several states, of all suits of a civil nature," &c., which we understand to mean, in cases where a citizen of the state can bring a suit in the state court against another citizen or resident, an alien, or citizen of another state may bring a similar suit in the Circuit Court of the United States, on a similar cause of action, and that he will be entitled to the same remedy on his judgment.

We now put the question, can any citizen of Louisiana obtain from a District or Parish Court, or from the Court of Probates itself, an order of seizure and sale against mortgaged property, composing part of a succession, in the course of administration in the Court of Probates, and represented by an executor, administrator, or curator? We are certain no such process could be issued from a state tribunal. Where then is the authority of the Circuit Court to give any such order, or judgment as it did? It is not in the act of Congress, nor can it be found in the state laws, from which the Circuit Court derives its only authority to grant decrees or orders of seizure, if it has any such power at all.

The counsel for the defendant has strongly pressed on us, a decision of the Supreme Court of the United States, in 14 Peters, 67, in which that tribunal says, that a suit in the Circuit Court for Alabama, against an administrator, shall not abate in consequence of a plea that the estate so represented is insolvent, and is being administered under a statute of the state, which statute specially exempts foreign contracts from its operation. But the court goes on to argue and decide a question not before it, and declares that, if the exception in the statute did not exist, still the action

would not abate. This is possibly true ; but decisions on questions not before a court, are in general not entitled to much weight ; and we see no peculiar force in the reasoning on which this decision is based. It may have been, that the demand of the plaintiffs was not admitted by the administrators, and that, when sued, they availed themselves of every plea to get clear of the action. The decision was on a plea in abatement ; but the Supreme Court did not say, and we doubt if it ever will say, that a creditor, residing in another state, can sue in the Circuit Court of the United States, the executor, or administrator of an estate, being administered in the Court of Probates as insolvent—obtain a judgment—and issue execution on it in violation of the state laws, and take the property out of the hands of the executor or administrator, and leave nothing for the domestic creditors. This court in 2 La. 351, said : “ We have looked in vain for anything in the constitution of the United States, which gives this advantage to a citizen of another state (to seek a different remedy in the United States court,) over our own citizens ; and which makes right depend not on contract or the law of contracts, but on the tribunal where the remedy is sought.” 4 La. 83. We do not intend to deny, that if an executor, administrator, or curator, refuses to admit the justice of a debt claimed by an alien, or non-resident creditor, and will not class it as an acknowledged debt against the succession to be paid as others, that he may be sued in the Circuit Court of the United States, and a judgment liquidating the demand obtained ; but that judgment must state that it is to be paid out of the assets in the hands of the executor, &c., to be administered in due course of law, and no execution can issue in favor of the alien or non-resident creditor, unless one can be issued in favor of the domestic creditor in a similar case. We are, therefore, of opinion, that the Circuit Court of the United States for the Eastern District of Louisiana, had no jurisdiction or authority to issue the order of seizure and sale against Hector McNeil, testamentary executor of the succession of Alexander McNeil, deceased.

But, say the counsel for the defendant, if the proceedings were not good against the testamentary executor, they were legal against Hector McNeil as the universal legatee, or heir of Alexander McNeil deceased. The first answer to this argument is,

that the proceedings are not against him, in that capacity ; and the second, that the question of domicile is entirely opposed to the position. If the defendant was not a citizen, the process could not have been issued. The Circuit Court has no jurisdiction, when neither of the parties are citizens of the state in which the action is instituted. Peters' C. C. R. 431.

There is another objection: the defendant shows, that the estate of Alexander McNeil is largely indebted, and the executor was bound to administer it for the benefit of the creditors ; and in the petition filed on the 16th July, 1840, against the Exchange Bank, he alleges that he is so doing. It appears to us, that it is not competent for the defendant to depart from the record under which he avers that he claims, and to rely upon a right no where set forth in the answer.

The defendant's counsel further contend, that these nullities and objections cannot affect him, as he is a purchaser in good faith, and without knowledge of any of them; and that the only remedy is by an action to annul the proceedings in the Circuit Court of the United States, or by an appeal to the Supreme Court. In the first place, we doubt very much the ignorance and want of knowledge of the defendant; and secondly, we consider the judgment or order, a nullity, having been given by a court having no authority to render it.

We come now to the proceedings of the Marshal, and to see how far he has complied with the legal formalities in the premises. There is no doubt, that the Marshal and Clerk of the court were bound to act in conformity to the articles of the Code of Practice, in relation to executory process. The 735th article provides, that "in obtaining this order of seizure, it shall suffice to give three days notice to the debtor, counting from that on which the notice is given, if he resides on the spot, adding a day for every twenty miles between the place of his residence and the residence of the Judge, to whom the petition has been presented." The notice was given to Hector McNeil on the 29th of May, 1840, requiring him to pay within three days. On the 1st of June the property was seized, advertised on the 4th, and sold on the 6th of July, 1840. It is proved, that from New Orleans, the residence of the Judge, to the parish of Madison, is 430 or 440 miles.

At least twenty-five days notice was, therefore, necessary. The Supreme Court of the United States, in 15 Peters, 167, say, until this notice is given, and the time has elapsed, the order directing the seizure is not a final judgment, upon which a writ of error will lie. If this be so, no executory proceedings can be had under it. The Circuit Court and the Marshal are clearly bound by this construction of the law, and the sale was, therefore, premature, according to that decision. See also 7 Mart. N. S. 513. 15 La. 184.

The next question is in relation to the fruits, revenues, and improvements. The defendant alleges, that he is a possessor in good faith, and ought only to account for the fruits and revenues, from the inception of the suit; and he claims the value of the improvements made by him. The inferior Judge thought he was not a possessor in good faith, and decreed that he should account for the fruits and revenues of the years 1840, 1841, and 1842, that is, from the date of his possession. He made an allowance for the expenses of the plantation; also for the full value of the improvements placed on the land, and for clearing ninety acres. The balance of the value of the crops, the Judge compensated against the sum of \$16,000, which it is pretended the defendant paid for the land, with interest thereon, which left a small balance in favor of the defendant, for which he had a judgment.

It is very certain, that a possessor in good faith, under a title which he honestly believes to be just in point of fact and in form, is not bound to account for the fruits and revenues, until the property is claimed by the real owner. The possession and title upon which the fruits and revenues can be retained, must be such, as the party must have, to entitle him to the prescription of ten years. Article 3414 of the Civil Code, declares, that the possessor in good faith is he, who has just reason to believe himself the master of the thing which he possesses, although he may not be so in fact. The next article says, that the possessor in bad faith is he, who knows that he has no title, or that his title is vicious and defective. It is hardly possible for any one to read the facts of this case, and doubt that the defendant was not aware of a defect in his title. Article 3450 of the Civil Code defines a *just title* to be one, which the possessor may have received from any one, whom

he *honestly* believed to be the real owner, provided the title were such as to transfer the property. The title must also be valid in point of form ; for, if the possession commenced by a contract void in that respect, it will not protect the possessor, as being in good faith. Art. 3452. In 7 Mart. N. S. 112, this court said, that a possessor without a just title, owes the fruits from the beginning of his possession. That was a case, in which the executor of a deceased person sold the property without an order of the Court of Probates, and it was shown that the defendant was ignorant of the fact. The court said, that he was bound to know whether there was an order, or not. So in 8 Mart. 629, a sale made by a tutrix, of minors' property, without a compliance with the formalities of the law, was held not to be a just title, under which a party can possess in good faith. The authorities cited by the counsel for the defendant, do not contravene any of these positions. They all go to show, that the possessor in good faith is entitled to his improvements, and to the fruits and revenues, which is undeniable ; but they have not convinced us that the defendant is such a possessor. It having been shown, that a forced sale, without a judgment to authorize it, is an absolute nullity, it only remains for us to say, that a judgment given by a court having no jurisdiction or authority to render it, is also a nullity, and has no effect, and cannot form a basis of title.

We are, therefore, of opinion, that the District Judge did not err in considering the defendant as a possessor in bad faith ; and for that reason, accountable for the fruits and revenues from the date of his possession.

In stating the value of the crops, the expenses of the plantation and the improvements, we do not think the Judge erred ; and his application of the balance found against the defendant, to discharge the price paid by him for the property, with interest, is correct.

After the judgment was rendered in the lower court, a member of the bar, who does not appear from the record to have been of counsel in the case, offered his affidavit, stating that he was one of the counsel for the defendant in this suit, and that he had discovered, since the rendition of the judgment, new and material evidence in the case. He then adds, that he expects to prove by Thomas W. Amonett, the waiver of legal delay after seizure, by

Hector McNeil, the testamentary executor of Alexander McNeil ; and that he was not aware of the existence of this evidence on the trial, though he had used due diligence to obtain the necessary testimony. The witness by whom this new and unknown fact is expected to be proved, was examined on the trial of the cause. He was the overseer of the defendant for a considerable time, as he states in his testimony, and appears to have been one of the principal witnesses in the case ; yet he never stated that there was any waiver of the legal delay in giving the notice, nor was he interrogated on that point. It is not shown, that the defendant and the other counsel in the case were also ignorant of this fact. The cause was tried at the November term, 1842, and the Judge held it under advisement for some time, and the judgment was by consent entered on the records at the May term, 1843. This affidavit was made at that term of the court. In 6 Mart. N. S. 327, and 7 Ib. N. S. 125, this court said, that affidavits of this description, for the purpose of obtaining a new trial, ought to be received with caution, and under great restriction. 18 La. 531. In 3 La. 383, it was held, that a new trial would not be granted on the ground of newly discovered evidence, if it appeared that the evidence consisted of the testimony of a person who had been summoned as a witness, and dismissed without examination. If there was a waiver of the legal delay as to the notice, it is a little remarkable the Marshal should not have mentioned it in his return ; and it is scarcely credible, that the defendant should have been ignorant of the fact, and the overseer, who was on the place at the time, have known it. It does not appear that any diligence was used, previous to the trial, to procure such evidence. The omission of counsel to interrogate the witness as to a fact, is no ground for a new trial. If the fact had actually been proved, we think it would have been another link in the chain of circumstances, going to prove collusion between Hector McNeil and some of the other parties concerned in this transaction. The Judge did not err in overruling the motion for a new trial.

In examining the final judgment, we find the Judge has fallen into an error, which it is necessary for us to correct. After the application of the proceeds of the fruits and revenues to the price which the defendant had paid for the property, and to the interest

Lowry, Curator, v. Erwin.

thereon, there remained a balance of \$436 55 in favor of the defendant; for which sum, the Judge gave him judgment against the succession of Alexander McNeil, deceased, as upon a demand in reconvention. In this he erred. The defendant, in his answer, did not pray for a judgment in reconvention, but asked, that in case of eviction, the price he paid should be refunded to him before a writ of possession should issue. This, he had a right to demand. Besides, the District Court had no authority to give a judgment against the estate of McNeil, which is being administered in the Court of Probates.

The plaintiff has asked us, in the event of our affirming the judgment, to remand the case, for the purpose of enabling him to recover the fruits and revenues since the year 1842, the defendant having taken a suspensive appeal, and thereby kept the plaintiff out of possession. We think it best to put an end to the present contest, and to reserve to the plaintiff, his right to claim the fruits and revenues since the 1st January, 1843.

The judgment of the District Court, so far as it decrees to the plaintiff the right to, and possession of the plantation and slaves described in the petition, is affirmed; also as to the nonsuit in relation to the slaves Kitty Dixon, and her children, and Little Henry or Henry Lee, and as to the fruits and revenues, and their application to the price and interest said to have been paid by the defendant; but as relates to the judgment of \$436 55, with interest, as stated therein, against the succession of Alexander McNeil, deceased, the same is annulled and reversed; and we do order and decree, that no writ of possession issue in this case, to put the plaintiff in possession of the plantation and slaves, until he pay the defendant, or deposit in the hands of the Sheriff of the parish, to the credit of the defendant, the sum of \$436 55, with interest thereon, at the rate of five per cent per annum, from the 18th day of March, in the year 1843, until the day of payment, or deposit; the appellee paying the costs of the appeal.*

* THE COUNSEL for the defendant, prayed for a re-hearing as to so much of the opinion as pronounced their client a possessor in bad faith, and, therefore, responsible for the fruits and revenues of the property from the date of

Lowry, Curator, v. Erwin.

the purchase. The facts of the case, as disclosed by the record, are simply these, so far as *James Erwin*, the defendant is concerned.

On the 6th of July, 1840, he purchased, at a sale made by the Marshal of the United States, under an order of seizure and sale emanating from the Circuit Court of the United States, for the Eastern District of Louisiana, a certain plantation and slaves, the property of the estate of one Alexander McNeil, or his universal heir Hector McNeil, the said order issuing at the suit of a man named *Andrew Erwin*; that he paid sixteen thousand dollars cash, for the same, being more than two-thirds of the appraised value on oath, of said property.

That, on the 24th day of April, 1841, ten months after James Erwin bought the property as above stated, the plaintiff in the present action, A. J. Lowry, got himself appointed curator of the vacant succession of Alexander McNeil, deceased, when the record shows, by facts incontrovertible, that in no point of view was it a vacant one. C. C. 1088. That on the 16th of August following, he instituted the present petitory action against the defendant, the citation however not being served until the 4th of December, 1841, one year and five months from the date of his purchase; and that he obtained a judgment against Erwin: 1st. Because the court which issued the order of seizure and sale had no authority to issue it; and 2d. Because the formalities required in the alienation of property at a forced sale, had not been observed.

Where then are the facts which make James Erwin a possessor in bad faith? That he happens unfortunately to bear a surname similar to that of the man who obtained the order of seizure and sale, is not to be construed into a presumption of relationship, or interpreted as a badge of collusion and fraud. Amidst all the evidence there is not a single fact which will stamp, or has stamped James Erwin as a possessor in bad faith. That the District Judge "thought he was," is of little moment. The case does not appear to have been argued below, and even if it was, the *suspensive* appeal taken by the defendant, is strong presumption, at least, that he felt that the lower tribunal had done him a gross injustice by its decision.

If James Erwin be a possessor in bad faith, from the facts stated, then is every man, who purchases at a Sheriff's or Marshal's sale, when there are illegalities in the judgment, under which the officer proceeds, or a want on his part of those formalities which the law requires him to pursue; and yet we are unwilling to believe, that this tribunal is prepared to recognize such a doctrine. That hitherto it has not done so, is apparent from its decisions. In the case of *Poultney's Heirs v. Cecil's Executor*, 8 La. 424, this court held, that the rights of purchasers will be maintained, even though the judgment be subsequently reversed, for want of jurisdiction in the court which rendered it; and though this may be considered as carrying the doctrine very far, for applied to the present case it would perfect Erwin's title, if the Marshal had observed the delays which the law requires in forced sales, yet it is very evident, that such a purchaser could not, and would not be deemed a knavish possessor. The

Lowry, Curator, v. Erwin.

Civil Code, art. 3414, says, "the possessor in good faith is he who has just reason to believe himself master of the thing which he possesses, although he may not be in fact, as happens to him, who buys a thing which he supposes to belong to the person selling it to him, but which in fact belongs to another." Let us test the quality of the defendant's possession by this rule. Had James Erwin "*just reason*" to believe himself owner of the property claimed from him? We say that he had:—

1st. He possessed as owner, by virtue of an act sufficient in terms to transfer property, the defects of which he was ignorant of; for the law *presumes* this ignorance until the institution of a suit for the recovery of the property by the real owner. Civil Code, art. 95.

2d. He purchased at a public sale made by the United States Marshal.

3d. Although not required by the law to examine into the validity of the judgment rendered by the United States Court, yet if the defendant had done so in the present case, he would have learned that the order for the seizure and sale of the property, in the first instance was obtained by one of the oldest lawyers in the City of New Orleans, (Alfred Hennen, Esq.); that the same was granted by a Judge of the United States. Had he still been scrupulous on the mooted point of jurisdiction, counsel would have informed him, that the Supreme Court of the United States, in 14 Peters, 67, had settled the question. Had he still doubted, he would have been told, that Hector McNeil, the defendant to the order of seizure, was the *universal legatee* of Alexander McNeil, and that, although in the process he was styled testamentary executor, yet, being *in fact* heir at law and universal legatee of Alexander McNeil, it smoothed the apparent difficulties in the way.

Had he been told, that Hector McNeil was not a citizen of Louisiana, he would have satisfied himself that this objection could not avail, by turning to his declaration of domicile, on the public records.

Had he been warned, that Alexander McNeil's succession should be represented by a curator as a vacant succession, he would have pointed to the 1088th art. of the Civil Code, and might well have asked, is this a succession that no one claims? Are all the heirs of Alexander McNeil unknown? or have the known heirs renounced it?

Had he been warned, that the smallness of the price which he gave for the property, would be construed or deemed a badge of fraud, he would have pointed to the sworn appraisement made at the sale, and to the fact of the universal depression of property, all over this State at least. Can it then be said, in the face of all this, that "he well knew his title to be vicious and defective," Civil Code, art. 3413; for, to constitute him a possessor in bad faith, such knowledge is necessary. In *Pearce v. Frantum*, 16 La. 414, this court held the defendant to be a possessor in good faith, although the evidence clearly established, that Frantum had stated to a witness, that "he *well knew* he had no title to the land." Knowledge of the defective character of his title must be proved by clear and incontestable facts, not deduced from mere surmises or suppositions. In fact, to admit the doctrine, that a purchaser at a

Sheriff's sale is necessarily in bad faith, because there are informalities in the proceedings, would tend at once to the ruinous sacrifice of every man's property which might be exposed at such a sale.

The case cited from 7 Mart. N. S. 112, is believed not to be analogous to the present. The court decided that case on the grounds, that the very act of sale under which the defendant claimed, purported to be a private sale of succession property by an executor, when the law was clear, that executors could only sell at auction, and under an order of the court; the title, or the deed was not, and could not be translativ of property; it was null on its face. The authority from 8 Martin, 629, supports the same view. But here the title is not to be found in the deed, but in the *adjudication* by the Marshal, 7 Mart. N. S. 227. It was under that adjudication, that the defendant's, Erwin's, title vested until evicted by a superior one. The Code of Practice, art. 695, says, that "the act of sale adds nothing to the force and effect of the adjudication, but is only intended to *afford the proof of it.*" In *Balfour v. Chinn*, 7 Mart. N. S. 358, this court held, that the purchaser was in good faith, until the institution of a suit, although he had bought property to which the defendant in execution had no manner of title. Every presumption of law then is in favor of the good faith of the defendant, Erwin—the judgment, the sale by the Marshal, and the adjudication. Such strong presumptions, ought not to be lightly disposed of; they ought only to yield to *facts*.

Fraud will not be presumed. Here the plaintiff charges fraud and collusion, but fails to advance even one witness, one fact, or one circumstance to prove it. All is presumption—presumption. "*Vox et prateria nihil.*"

Re-hearing refused.

SPENCER GRIFFIN v. HIS CREDITORS.

Where a creditor whose debt is actually due, gives time to his debtor, taking a note payable at a future period, but stipulating that on failure by the latter to pay at the maturity of the note, he shall pay the highest conventional interest from the date of the note till paid, the agreement is legal. In such a case the creditor will be presumed to have remitted the interest he had a right to exact for the credit allowed, and the debtor, on failing to take up the note at maturity, will only pay the conventional interest allowed by law. Otherwise, where such a stipulation is contained in a note given for the price of property sold on a credit. In this case it must be presumed that the price was proportioned to the length of credit, and paid not only for the property, but for its use from the sale to the stipulated time of payment, and that any penalty or damages agreed on, though in the form of interest, must have been for the purchaser's default or delay in paying, which is usurious and illegal. To enforce such an agreement, would be to compel the purchaser to pay

Griffin v. His Creditors.

the amount of the interest between the date and maturity of the note, in addition to the highest conventional interest from the latter period, thus condemning him to pay as a penalty, or as damages for the inexecution of an obligation to pay money more than the highest rate of conventional interest, which, whatever be the shape of the contract, the law forbids. C. C. 1925, 2895.

Where the object of a contract is anything but the payment of money, the parties may determine the sum that shall be paid as damages for its breach, and the courts will lend their aid to carry the agreement into effect. C. C. 1928. *Aliter*, where the contract is to pay a sum of money. In such a case, no damages exceeding the highest rate of interest allowed by law, can be stipulated. The damages due for delay in the performance of an obligation to pay money, are called interest. The creditor is entitled to such damages, without proving any loss; and he can recover no more, no matter what loss he may have sustained. C. C. 1929.

In ordinary partnerships, each partner is only bound for his share of the partnership debts, to be calculated in proportion to the number of partners, and without reference to the portions of the stock or profits to which each may be entitled. C. C. 2844.

Where a creditor becomes the purchaser of property sold at her instance at a Sheriff's sale, subject to her mortgage and privilege as vendor, the debt secured by such mortgage and privilege is, *pro tanto*, extinguished by confusion. She cannot claim to have the price bid by her imputed to another debt, so as to affect the rights of other creditors.

The rules laid down by the Civil Code, art. 2162, relative to the imputation of payments where two debts are of the same nature and equally onerous, apply to settlements between debtor and creditor; they cannot be enforced to the prejudice of third persons.

APPEAL from the District Court of Rapides, King, J.

Brent and O. N. Ogden, for the appellants, Lambeth & Thompson.

Brewer, for the appellant, D. M. Cotton, and for V. F. Cotton and D. H. Stokes.

Dunbar, Hyams and Elgee, for Wm. Stokes.

Evans, for E. A. Wilder.

MORPHY, J. In a tableau of distribution filed in this case, Lambeth & Thompson were set down as privileged creditors on certain slaves, as the holders of a note for \$1966 66 $\frac{2}{3}$, dated the 8th of February, 1836, and made payable three years thereafter, with interest at ten per cent per annum from its date, if not punctually paid at maturity. They were besides put down as judgment creditors for \$4855 98. D. A. and W. A. Stokes, were ranked as mortgage creditors for \$4294 81, and Mrs. E. A. Wilder, for a balance of \$7610, due her on a judgment. A number

of oppositions were made to this tableau, some of which only it will be necessary to notice in this court.

Diey M., the wife of Valentine F. Cotton, but separated in property from him, opposed the claim of Lambeth & Thompson, as holders of the note for \$1966 66 $\frac{2}{3}$, alleging that said debt is wrongfully placed on the tableau in their name; that she is the legal and *bona fide* proprietor of said note, having received it, with other notes, for her portion, in the partition of her father's, Joseph Brown's, succession; that she never parted with her interest in said note, and that it was recognized and declared to be her paraphernal property, in a judgment of separation which she obtained against her husband. She prays to be placed on the tableau in lieu of Lambeth & Thompson, as a creditor of the insolvent, for this note, and the interest due thereon.

Valentine F. Cotton joined in the opposition of his wife, averring, in substance, that the note for \$1966 66 $\frac{2}{3}$ was, with sundry others, transferred, or delivered by him to Lambeth & Thompson, at a time when he owed them nothing; that it was understood that this transfer was made as collateral security for any advances they might make for him; that they subsequently made some small advances for Griffin & Cotton, who were ordinary planters, but that the amount thus advanced, so far as he was indebted for it, was more than paid by the other notes received and collected by Lambeth & Thompson, and by the sale of a crop of cotton shipped to them by Griffin & Cotton, which they sold, and of which they received the proceeds; that he owes them nothing, and has never at any time been in their debt; but that, on the contrary, they are largely indebted to him, &c. He prays that his wife's opposition may be sustained, and the note for \$1966 66 $\frac{2}{3}$ placed on the tableau as her property.

Mrs. E. A. Wilder maintains in her opposition, that the balance of \$7610, for which she is set down on the tableau, should take precedence of, and be paid before, any other debt, it being due upon property acquired by the insolvent from her first husband, Anthony Griffin, and now surrendered to his creditors.

Lambeth & Thompson opposed most of the claims on the tableau, and specially that of the Stokes, which they prayed might be rejected.

Griffin v. His Creditors.

On the trial of these oppositions, the Judge below dismissed the opposition of Dicy M. Cotton, and of her husband, V. F. Cotton, and gave judgment in favor of Lambeth & Thompson for the note of \$1966 66 $\frac{2}{3}$, but only with five per cent interest thereon from the date of the protest, with the vendor's privilege on certain slaves, in part payment for which, it had been given. He allowed the claim of Wm. Stokes for \$1749 37, and that of David Stokes for \$1277 11, with five per cent interest on their respective amounts from the 2d of September, 1841, and with legal mortgage upon the property of their former tutor from the 10th of May, 1834, but to take effect upon the slaves subject to the special mortgage of Lambeth & Thompson, only after they shall be paid. The Judge finally gave judgment in favor of Mrs. E. A. Wilder, for \$6028, with ten per cent interest per annum, from the 2d of August, 1841, but with a privilege on the slaves included in the sale made by her husband to the insolvent, only for \$1053, and with a mortgage for the balance, to wit, \$4975, to be exercised after the special mortgage of Lambeth & Thompson, and the legal mortgage of the Stokes.

From this judgment, Lambeth & Thompson, and Dicy M. Cotton have appealed. E. A. Wilder, in her answer to the appeal, prays that the judgment below may be so amended as to allow her the whole amount of her claim, instead of \$1053 only, out of the proceeds of the slaves sold by her husband Anthony Griffin.

Lambeth & Thompson complain, that the Judge allowed them only five per cent interest on the note of \$1966 66 $\frac{2}{3}$, from the date of protest, when the note, upon its face, calls for interest at ten per cent per annum, from its date, if not paid at maturity. They aver, that the stipulation which this note contains, is perfectly legal, and is not usurious. They refer us to two decisions of this court, to be found in 8 Mart. 716, and 1 Robinson, 130. In the latter case, the defendant was relieved from the penalty, because no demand was made on the maker of the note, at its maturity; but the legality of the penalty does not appear to have been questioned, and formed no point in the case. From the report of the other decision, the note does not appear to have been given for property bought on credit. The debt was probably one actually due, when the note was made. The creditor who, voluntarily,

and without receiving any consideration, gives time to his debtor, may well be considered as having remitted the interest which he had a right to exact for the credit allowed. In such a case, the condition, or agreement, that on the debtor's failure to pay at maturity, he shall pay ten per cent interest from the date of the note, is perfectly legal, and the promissor is bound by it. The money was *debitum in presenti, solvendum in futuro*. He in truth pays only ten per cent per annum for the use of the money. But the present case is widely different from that.

The record shows, that this note was given for the third instalment of certain slaves, sold at the probate sale of the estate of Joseph Brown, and bought by the insolvent on a credit of one, two, and three years. Until the expiration of these terms of credit, the purchaser owed nothing. The price he agreed to give for these slaves, must be presumed to have been, and no doubt was, proportioned to the length of credit announced at the public sale. It, therefore, paid not only for the property purchased, but also for its use and enjoyment from the day of the sale up to the stipulated time of payment. Civil Code, arts. 2047, 2048, 2049. Pothier, Vente, No. 286, p. 169.

If, then, any penalty or damages were agreed on, it must necessarily have been entirely for the purchaser's default or delay to pay the money. There is, in our law, a marked difference between the damages which may be stipulated for the breach of an obligation to pay money, and an obligation to give a thing or perform an act. Where the object of a contract is anything but the payment of money, the parties may determine the sum that shall be paid as damages for its breach, and courts of justice will not interfere with such agreements; but, on the contrary, will lend their aid to carry them into effect. Civil Code, art. 1928. But it is otherwise, when the contract is to pay a sum of money. The law has provided, that no damages exceeding ten per cent on the amount that was to be paid, can be stipulated. Article 1929 of the Civil Code declares, that "the damages due for delay in the performance of an obligation to pay money, are called interest. The creditor is entitled to these damages without proving any loss; and whatever loss he may have suffered, he can recover no more. Article 2895 of the same Code, provides, that "interest is legal or con-

Griffin v. His Creditors.

ventional; if conventional, it cannot exceed ten per cent." Any contract, or agreement, therefore, into whatever shape it may be thrown, which stipulates for more than ten per cent damages, or interest, for the delay to pay money, is illegal. 1 Pothier, Oblig. No. 170. 6 Toullier, No. 266 and No. 809. If, in the present instance, the penalty was enforced, the purchaser would be made to pay, for the three years elapsed, thirty per cent over and above the interest of ten per cent, which has been running from the date of the protest. This penalty, or these damages, (the name is unimportant,) would clearly be awarded for the inexecution of an obligation to pay money. As the law forbids that such damages shall exceed ten per cent per annum, on the amount of money which the debtor has bound himself to pay, the inferior Judge acted correctly, in our opinion, in refusing to carry such a stipulation into effect, and in allowing only legal interest, pursuant to article 1933 of the Civil Code.

Our attention has next been called to the opposition of Mrs. Cotton, and that of her husband, Valentine F. Cotton. The evidence shows, that the note of \$1966 66 $\frac{2}{3}$, which they claim, fell, with other notes, into the lot or share of Diey M. Cotton, at a partition of the estate of her father, made on the 20th of April, 1836. This note, together with several others, was deposited by Cotton to his own credit, in the Bank of Louisiana at Alexandria, and, on the 29th of February, 1837, they were ordered, by a letter of Cotton to the Cashier, to be thereafter held for the account of Lambeth & Thompson. Some of these notes were paid, and the proceeds given to them. They also received those which remained unpaid. It is not shown that any consideration was at that time given for these notes by Lambeth & Thompson, nor that Valentine F. Cotton was then in any way indebted to them. He alleges in his opposition, and it has not been denied, that the notes were delivered to them, by his order, as collateral security for any advances they might make to him thereafter. From an account current which we find on the record, signed by Lambeth & Thompson, on the 16th of November, 1839, they appear to have made advances to Griffin & Cotton, then associated as partners in the business of planting and cultivating cotton, to the amount of \$14,025 57, between the 13th of June, 1838, and the 12th of January, 1839. The

account is credited with \$4583 31, as the proceeds of the notes given to Lambeth & Thompson in 1837, and with \$5214 84, as the proceeds of cotton shipped to them by Griffin & Cotton; and it is stated at the foot of the account that they held the note of \$1966 66 $\frac{2}{3}$, then under protest. It is urged by the opponent, V. F. Cotton, that the amount of these notes received by Lambeth & Thompson, added to one-half of the proceeds of the cotton, overpays the portion of the advances to Griffin & Cotton, for which he, as an ordinary partner, could be made liable, to wit, \$7012 78 $\frac{1}{2}$; that his debt to them being thus paid, they have no right to retain this note of \$1966 66 $\frac{2}{3}$, which is his individual property, and to apply it to the debt of Griffin, his former partner. We think that this opposition should have been sustained. Had no payment whatever been made by the partners Griffin & Cotton, it is clear that Lambeth & Thompson could not have recovered from each partner more than one-half of the debt. Civil Code, art. 2844. They received these notes with the knowledge that they were the separate and individual property of Cotton, long before any advances were made to the partnership he subsequently formed with Griffin. They could not apply them without Cotton's consent, to the debt due by his partner. It is urged, that commission merchants who do the business of partners of this kind, keep but one account, and credit it with whatever cash payments are made by either of the partners; that such payments must be presumed to be made on joint account; and that negotiable paper cannot be placed on a different footing. This may be, and we believe is true, in relation to payments made by the partners during the partnership, and in the ordinary course of remittances; but, in the present case, Lambeth & Thompson had had previously possession of this note, and had held it as the separate property of Cotton, who they knew was liable only for his half of the partnership debt; they could not, therefore, without his express consent, apply it to the debt of another person.

The facts in relation to the claim of Mrs. Wilder, are these. On the 23d of November, 1836, she obtained, against the insolvent, a judgment for \$5500, a balance yet due to her as the purchase money of a plantation and some slaves, sold to him by her husband, Anthony Griffin, on the 23d of February, 1835, with inte-

Griffin v. His Creditors.

rest at ten per cent per annum from the 1st of January, 1835, on certain notes forming this amount. The judgment allowed her, moreover, the sum of \$10,000, with ten per cent interest per annum from its date, until final payment. On the same day she entered into a settlement, or compromise, in which, among other things, she allowed him on the \$5500, a credit of \$641 50, and on the debt of \$10,000, another credit of \$3500, and for the balance of \$6500, she received four notes of \$1625 each, payable at one, two, three, and four years, bearing ten per cent interest. To secure the payment of the five remaining notes given in 1835, and the four notes of \$1625 each, the insolvent executed a mortgage to her on the land he had purchased from her husband, and on a certain number of slaves. Two of the notes of \$1625 not having been paid at maturity, she sued out an order of seizure and sale against the land and slaves. A sale of the land and of two of the slaves took place, on the 2d of August, 1841, under her writ, and another writ of Wolf, Bishop & Co., as holders of one of the notes of \$1625. At this sale, Mrs. E. A. Wilder became herself the purchaser of the land subject to her vendor's privilege, and of the two slaves mortgaged to her, with others, on the 23d of November, 1836. The property was adjudicated to her for nine thousand eight hundred and ninety-five dollars. On calculating up to the day of the Sheriff's sale the interest due on the remaining notes given for the land in 1835, we find that the balance of the price then due to Mrs. Wilder, amounted to \$8268 04. The Judge, it appears, applied to the payment of this balance, \$7215 04, the amount of her bid for the land, after deducting a previous mortgage in favor of the City Bank, thus leaving unpaid the \$1053, for which only he allowed to her a vendor's privilege on the slaves sold, together with the land, by Anthony Griffin. As to the proceeds of the slaves Adam and Levi, he imputed the amount to the remaining notes of \$1625, secured by the mortgage on these slaves, and others in November, 1836. This left a balance due Mrs. Wilder, of \$4975, for which she complains that the judgment disallows her a privilege on the remaining slaves, sold by her husband to the insolvent, in 1835. The Judge below did not err. Mrs. Wilder having become the purchaser of the land, subject to her vendor's privilege, bearing

date the 23d of February, 1835, and to her mortgage claim under the settlement of the 23d of November, 1836, these debts were extinguished by confusion, in the same manner, and in the same order as if another person had bought the property, and the price had been applied to the payment of these two debts. Civil Code, art 2214. Code of Practice, art. 708. 3 La. 212. It is said that, as she had a mortgage on the land and the slaves, and the sale was made at her suit on the two notes of \$1625, the money brought by the land should not have been imputed exclusively to her privileged debt, but that the most legal and equitable mode of applying it would have been to impute it to the whole debt of Mrs. Wilder, without any distinction; and we are referred to the rules laid down in the code for the imputation of payments, when two debts are of the same nature, and equally onerous. Civil Code, art. 2162. These rules, which are to govern in the settlement of accounts between a debtor and his creditor, cannot clearly be enforced to the prejudice of third persons. As soon as the insolvent, who became the tutor of Wm. and David Stokes, on the 10th of May, 1834, bought of Anthony Griffin the land and slaves, in 1835, their legal mortgage attached to the property, subject only to the vendor's privilege for the price. The moment this was paid, their mortgage necessarily took effect, and has precedence of that of Mrs. Wilder, derived from the settlement of November, 1836. The effect of the imputation contended for, would be, to postpone their mortgage to hers on the slaves sold to the insolvent, by Anthony Griffin. The Judge, therefore, was right, in allowing her a priority on the proceeds of the slaves only, for the balance of the price, to wit, \$1053.

As to the amount allowed to William and David Stokes by the judgment, we have examined the evidence, and can find nothing in it which authorizes us to say, that it has been erroneously decreed to them.

It is, therefore, ordered, that the judgment of the District Court be so amended as to substitute Mrs. Diey M. Cotton in place of Lambeth & Thompson, as the owner of the note of \$1966 66 $\frac{2}{3}$, mentioned in the tableau; and that the judgment be affirmed in all other respects; the costs of this court to be borne by the appellants Lambeth & Thompson.

SAME CASE—APPLICATION FOR A RE-HEARING.

The rule *stare decisis* is entitled to great weight and respect, where there has been on any point of law a series of adjudications, all to the same effect; but a single decision, believed to have been unadvisedly or erroneously made, will be overruled.

Brent and *O. N. Ogden*, for *Lambeth & Thompson*, prayed for a re-hearing on the ground, that the court erred, in deciding the note for \$1966 66 $\frac{2}{3}$, to be the property of *D. M. Cotton*, and in sustaining the decision of the lower court refusing to allow interest from the date of the note. The decision as to the illegality of such stipulations must affect existing contracts to a great amount. The practice of taking notes for the price of property sold on credit, with the condition that they should bear interest at ten per cent from date, if not paid at maturity, originated more than twenty years since, under the sanction of this court. Such notes have been repeatedly sued upon, and their amounts, with the interest so stipulated, recovered. Many cases have been brought up to this court, with evidence establishing a sale on credit, and the judgments of the lower courts for the principal and interest have been invariably affirmed. If the legal question of the validity of such stipulations has not been raised, it was because the decision in *Lauderdale v. Gardner*, 8 Mart. 716, decided in 1820, was regarded as having settled the question. The court say, that the note sued on in the case of *Lauderdale v. Gardner*, "does not appear to have been given for property bought on a credit." From an examination of the original record in that case, it will be found, that the note was given for the price of two negroes, and that the note itself, which was in evidence, expressed the consideration. It was for \$1600, payable at twelve months, not at two months as stated in the report, with a condition, that it should bear "interest from date, if not punctually paid, at ten per centum per annum." The District Judge refused to allow interest except from the maturity of the note, and this refusal was assigned as error, in express terms, in the peti-

tion of appeal itself. With the question thus directly before them, this court reversed the judgment of the lower court, and rendered one for the amount of the note, with interest at ten per cent from its date. The case so decided, and the one now before the court, are identical. The rule *stare decisis* should be particularly adhered to in a case like this, where it is of infinitely less importance how the law is settled, than that it should be settled.

Although the Civil Code, art. 1929, speaks of interest as "the damages due for delay in the performance of an obligation to pay money," it is perfectly clear, that a note may be taken, either for property sold on a credit, or for an existing debt, with interest from its date, without being usurious. Had the note in suit stipulated for interest at ten per cent absolutely from its date, the debtor would not have been *in mora*, until after its maturity. Such a note would only differ from the one sued on, in this, that in the latter a condition was inserted favorable to the debtor, the performance of which was optional with him, and which if performed would have exonerated him entirely from the payment of any interest whatever. Can such a condition be construed to make a contract usurious, which, without it, would have been binding and legal? Will not a creditor who loses his money by such a process of reasoning, consider himself a victim to one of those hard constructions and strained inferences, of which Lord Bacon says, that wise Judges should beware? Much importance has been attached to the fact, that by the published terms of the sale, it was to be on a credit of one, two, and three years. On this fact the decision of the court seems to have been entirely based. It is argued, that in consideration of this extended credit, the purchaser paid more for the property than he would otherwise have done—that he paid for the time, in the enhanced price. But the court should also have inferred, that the purchaser likewise took into consideration, that, on failure to pay at maturity, he would be responsible for interest from the day of sale. If the credit operated to enhance, the penalty tended to diminish the price.

By the English law, which is extremely rigid against usury, which vacates the contract entirely, and renders the taking of more than legal interest an indictable offence, it is not considered

usurious to stipulate for even a higher rate of interest than that allowed by law, where the debtor is permitted to discharge both the interest and principal, by paying the latter at the time fixed on. 7 Bacon's Abridgment, 190, *et seq.* Chitty on Contracts, and Hawkins' Pleas of the Crown.

As to the ownership of the note: The court say, that D. M. Cotton alleged, that the note was received by the appellants, Lambeth & Thompson, as collateral security for future advances, and that this has not been denied by them. No inference unfavorable to Lambeth & Thompson should be drawn from this circumstance, as they could not have denied this allegation. To have done so would have been in the nature of a replication, not allowed by our practice. The note, whether given as a payment, or to secure future advances, was a negotiable instrument, transferred before maturity, which Lambeth & Thompson received as so much money. If V. F. Cotton chose to pay, both for himself and his partner, he cannot recover back what he has so paid. Had he not volunteered the payment, Lambeth & Thompson might have secured from his partner, the share for which he was responsible to them. Cotton's wife has no more right than her husband to claim the note. There was nothing on it to show her title. It was endorsed in blank, and in the possession of the husband.

MORPHY, J. A re-hearing is prayed for in this case. No new arguments, or authorities, have been adduced, in relation to the question of *back interest*, (as it is called,) but the rule *stare decisis*, has been pressed upon us with zeal and ability. The counsel has shown, by the original record of the suit of *Lauderdale v. Gardner*, that the facts in that case were different from what we supposed they were, from the imperfect and incorrect report of it found in 8 Mart. 716. The note sued on appears to have been given in that, as in the present case, in payment for slaves sold on credit; but the question of usury was not even raised by the pleadings in the inferior court. The only defence set up in the answer was, that the defendant, Sarah Gardner, having renounced the community existing between her and her late husband, was not liable for its debts. The point in relation to the stipulation of back interest, seems, however, to have been made in the argu-

ment in the appellate court, as we find that in deciding the case, the court express their opinion on the legality of such a covenant, although they do not state as fully, as could be desired, the grounds on which it was contested. It is evident, from the manner in which the question was disposed of, that the point was not fully developed, as it has been on the present occasion. The case was, moreover, decided under the Code of 1808, which in its provisions is far from being as explicit on the subject, as that of 1825. Had the question occurred under the latter Code, and had it been then presented to the court in the same light as it has been to us, it is doubtful whether they would have come to the same conclusion. But be this as it may, this decision is the only one in our reports in which the point appears to have been at all considered. In the two other cases referred to by the counsel, that of *Glover v. Doty*, and that of *Hooper and Thomas v. Hyams, Executor*, the point was passed *sub silentio*. We cannot consider the case in 8 Martin, as so settling our jurisprudence on this subject, as to make it our duty to surrender to it our deliberate opinion on this question. The rule *stare decisis*, is entitled to great weight and respect, when there has been on a point of law, a series of adjudications all to the same effect; but when we are presented with a single decision, which we believe to have been unadvisedly made, it is incumbent on us to overrule it, if we entertain a different opinion on the question submitted. As to the stress laid on the circumstance, that in the section of country from which this appeal has come, the practice has long and universally obtained under that decision, of taking notes for the price of property sold on credit, conditioned to bear interest at ten per cent per annum from date, if not paid at maturity, we have only to say, that the sooner a stop is put to such a practice, the better. It is no great hardship, that the parties making such contracts should be restricted to the highest rate of conventional interest allowed by law, for any delay they may experience in the collection of their debts. Even for the sake of preserving our consistency, (so earnestly recommended to us,) we cannot believe ourselves justifiable in allowing, over and above such interest, a penalty or damages amounting, in this instance, to thirty per cent of the instalment claimed, and in some instances, as we under-

stand, to fifty per cent on the debts due. On the illegality of such a stipulation, we can not entertain a doubt. Conventional interest, whether it is stipulated *eo nomine*, or in the shape of a penalty for the default, or delay in the performance of an obligation to pay money, can not exceed ten per cent per annum, on the amount due, Civil Code, arts. 1929, 2121, 2995. There is no difference between stipulating a higher rate of interest than ten per cent per annum, for the delay, and stipulating only ten per cent, but to be calculated on a longer time than the delay which has occurred, or may really occur. In the present case, nothing was due before the maturity of the note sued on. Had the drawer then paid it, nothing in the shape of interest could have been claimed of him. If the holder is entitled to any, it is clearly due *ex mora*, and cannot exceed ten per cent per annum, for the time that the payment of the capital has been delayed. In a sale on credit, the price the purchaser agrees to give, is larger in proportion to the credit given, and pays not only for the property, but for its use and enjoyment between the day of the sale and the stipulated time of payment; therefore, any interest that might be stipulated to run during that interval, forms no part of the price, and can be viewed in no other light than as a penalty for the delay, or default to pay such price. But it is urged, that if, by the published terms of the sale, the extended credit was announced to the people, it was also made known to them, that they would have to give notes bearing interest at ten per cent from date, if not paid at maturity; that if, on the one side, the long credit operated upon the minds of the purchasers to increase the price, the danger of having to pay *back interest* must, on the other side, have operated to its diminution. Admitting this to be true, does it in any way render such a stipulation more legal? If, instead of such back interest at ten per cent, the published terms of the sale had announced that the notes, in case of non-payment, should bear twenty per cent from their maturity, would the announcement of such a stipulation render it less usurious? Could it be pretended that, because the purchaser had it in his power to relieve himself from such interest by paying the principal at the time fixed, there was no usury, and that the stipulation should be enforced? Could it be said, that as he had so made his contract, he should

be bound by it? A purchaser, under such circumstances, may well flatter himself, that he will be able to pay the price, which he considers moderate by reason of the credit allowed, and that he will not incur the penalty. The law protects contracting parties against their own imprudence and folly in such a case; and a stipulation, usurious in itself, cannot be rendered legal by the inconsiderate consent that may have been given to it, at the time of the contract. 6 Duranton, No. 488.

In relation to the ownership of the note of \$1966 66 $\frac{2}{3}$, we have no reason to be dissatisfied with the conclusion to which we came.

Re-hearing refused.

LEWIS A. COLLIER v. JOSIAH STANBROUGH.

A judgment rendered by a court of the United States, cannot be executed by the seizure and sale of the property of an insolvent succession, under the administration of an executor, curator, or administrator. It can only be satisfied by presenting it to the Court of Probates, under whose direction the succession is being administered, for classification, and payment in due course of administration. Nor can a court of the United States issue an order of seizure and sale, (executory process,) against property belonging to such a succession. It wants jurisdiction, *ratione materiae*. Such jurisdiction belongs exclusively to the Court of Probates. Local laws of the states can never confer jurisdiction on the courts of the United States. They can only furnish rules to ascertain the rights of the parties, and thus assist in administering the proper remedies, where jurisdiction has been vested by the laws of the United States.

APPEAL from the District Court of Madison, Willson, J.

Stockton, Steele and Copley, for the appellant. The legality of the execution of a writ from a court of the United States, cannot be examined into by a state court. 4 Cranch, 333. 2 Peters, 163. 6 Ib. 655. 10 Ib. 474. Yelverton, 179, 180. A *bona fide* purchaser at a Sheriff's sale, will be protected, though the writ was illegal, or illegally executed. 1 Cowen, 644. Yelverton, 179. A state court cannot enjoin an execution from a court of the United States. 7 Cranch, 280. Though the Mar-

shal did not obtain possession of the notes themselves, notice of the seizure to the debtor and holder, was equivalent thereto. 5 La. 484. 10 La. 452. Moveables seized in execution are not required to be appraised. Code of Practice, arts. 671, 680, 681, 693, (No. 7,) 722.

Amonett, on the same side. No state court can enjoin proceedings under a judgment of a Circuit Court of the United States. 1 Kent's Comm. 409. 5 Cranch, 115. 7 Ib. 279. 10 Wheaton, 21. 3 Story on Const., 625. The state law requiring that all claims for money due by successions, administered by curators, &c., shall be enforced only in Courts of Probate, is contrary to the constitution and laws of the United States. Const. U. S. 3 art. sect. 2; 1 art. sect. 10. Act of Congress of 24 Sep. 1789, sect. 11. 1 Kent's Comm. 419. 4 Wheaton, 122, 209. 12 Ib. 213. 8 Ib. 253. 10 Ib. 51. 5 Cranch, 115. 2 Peters, 136, 157. 3 Story's Comm. on Constitution, 546. The United States courts have jurisdiction over executors, curators, &c., when the residence of the parties is such as to confer it. Act of Congress, 24 Sep. 1789, § 31. 4 Dallas, 12. 1 Condens. Rep. U. S. 10, 217. The interest of a party in a note may be sold, though the note itself remain in the possession of the defendant. Code of Practice, arts. 642, 647. 2 Mart. N. S. 616. 4 Ib. N. S. 56, 418. 8 Ib. N. S. 213. 5 La. 486. 14 La. 132.

Phillips, Dunlap, Bemiss and Browder, for the defendant. The Court of Probates had original and exclusive jurisdiction, *ratione materiæ*, of all claims against the succession. 3 Peter's Condens. Rep. 311. Execution against a succession is unknown to our laws, by which, in such a case as the present, the courts of the United States are bound. 13 Peters, 45. Such process, if allowed, would destroy the privileges recognized by law, and substitute others.

SIMON, J. The plaintiff represents, that he is the owner of a certain debt which was originally due by one Dougal M'Call, to the vacant succession of Jesse Harper, deceased, that the debt is evidenced by three promissory notes made payable by M'Call, to the order of David Stanbrough, curator of the said vacant estate; and that said three notes are secured by a mortgage on a certain tract of land in the parish of Madison. He further states, that he

purchased the said notes at a Marshal's sale, regularly made by virtue of a writ of *fi. fa.* issued on a judgment rendered against said curator by the District Court of the United States, for the Eastern District of Louisiana. He also alleges, that the defendant Josiah Stanbrough, illegally possessed himself of the first due of said notes, obtained upon it an order of seizure and sale of the property mortgaged, and that the Sheriff is about to proceed to sell the land ; and that if he is permitted to proceed to the said sale, it will cause the petitioner an irreparable injury. He further avers, that he is a creditor of the said vacant succession in a large amount, and that said estate is insolvent ; that said curator has connived with the defendant Josiah Stanbrough, to cheat and defraud the estate and the creditors thereof, &c. ; and that said Josiah took the note in question with a full knowledge of plaintiff's claim, and gave no value or consideration for it. He prays to be declared to be the owner of the note ; but that, if he fails in his demand, said note may be adjudged to belong to the said vacant estate, and that the defendant may be perpetually enjoined from further proceedings, &c. A writ of injunction was issued accordingly.

The defendant first pleaded the general issue ; denied specially, that the plaintiff has any right to the note alluded to in his petition ; denied also, that said note was ever legally seized, or levied on, or sold by the United States' Marshal ; and averred, that he himself was the rightful owner of said note ; that the sale made by the Marshal was null and void, because the forms of law were not observed by said Marshal in making the sale ; that there was no legal seizure, no legal appraisement, and no advertisement ; that said sale was illegal and fraudulent upon its face, and is an absolute nullity ; and finally, that succession property in this State, in due course of administration, in the Probate Courts of Louisiana, cannot be legally subjected to any writ of execution from the federal courts, and that a sale thereof conveyed no rights to the plaintiff. He prayed, that the plaintiff's claim might be rejected, and the injunction be dissolved with damages, &c.

The court, *a qua*, rendered judgment in favor of the defendant, dissolved the injunction, and condemned the plaintiff, and his

surety on the injunction bond to pay to the defendant \$427 damages ; and from this judgment, the plaintiff has appealed.

The evidence establishes the following facts : A judgment was rendered in the United States Court, Ninth Circuit, Eastern District of Louisiana, in the suit of *The Farmers Bank of Virginia v. David Stanbrough, curator of the estate of Jesse Harper, deceased*, for upwards of \$12,000 ; the Marshal proceeded to execute said judgment against the curator, whereupon the curator obtained a writ of injunction from the Court of Probates to arrest the sale, which injunction was dissolved, on the grounds of usurpation, and assumed authority by the said Court of Probates. The Marshal then proceeded to seize all the rights and title of the curator to three promissory notes secured by special mortgage, then in his hands, and notified him of the seizure. The sale was advertised, but the notes were not appraised ; and the three notes were adjudicated by the Marshal to the plaintiff in this cause, for the sum of \$3500 cash. The aggregate amount of the notes is \$11,433 66. After the sale of the notes, the first due of the same, was endorsed over and transferred by the curator to Josiah Stanbrough, who obtained an order of seizure and sale thereon ; whereupon, the present suit was instituted, and the injunction sued out.

It is further admitted in the record, that the plaintiff is a creditor of Jesse Harper's estate and that, for ten years at least, said succession has been insolvent ; that David Stanbrough is, and has been the curator of said estate ever since the first of January, 1840 ; that an inventory of said estate was taken by the Probate Court ; that a sale of the property took place, and that the notes in dispute are the proceeds of the sale ; and that all the proceedings took place by order of the Probate Court. It is also admitted, that the notes sold by the Marshal never came into his corporal possession, &c.

There is no evidence that the note in question did not come fairly into the possession of the defendant. The note is endorsed by the curator, and it appears to have been so endorsed, previous to its being protested for non-payment.

This case presents a question very similar, in its nature and effect, to the one which we had under our consideration in

Garrard, Executor, and others v. Reed, lately decided at Opelousas, 5 Robinson, 506, in which we held, in substance, that a judgment rendered by a federal court cannot be executed by the seizure and sale of property belonging to an insolvent succession under the administration of a curator, administrator or testamentary executor; and that such judgment, sought to be enforced by an execution put in the hands of the Marshal, cannot be satisfied in any other manner, but by presenting the same to the Court of Probates, for classification, to be paid in the course of administration. Since then, a very similar question presented itself before us at the present term of this court, in the case of *Lowry, Curator, v. Erwin*, ante, 192, in relation to the issuing of an order of seizure and sale by the Circuit Court of the United States, in which we have again recognized the same doctrine supported by very strong authorities, and held, that "a creditor, residing in another State, cannot issue an execution upon the judgment which he has obtained in the federal court, against the executor, or administrator of an estate, which is administered in the Court of Probates as insolvent, and take the property out of the hands of such executor or administrator, and leave nothing for the other domestic creditors." As this court said, in 2 La. 351, this advantage cannot be given to a citizen of another State, as his right cannot be made to depend upon the tribunal where the remedy is sought; and we came to the conclusion in the case of *Lowry, Curator, v. Erwin*, that "the Circuit Court of the United States, had no authority to issue an order of seizure and sale against a testamentary executor." The want of jurisdiction or authority in such cases is *ratione materiæ*, and such jurisdiction belongs exclusively to the Probate Court. 3 Peters' Cond. Rep. 311.

Here, the property seized was already in the hands of the Probate Court: it was in the possession of the curator as an officer appointed by that court; this officer was bound to dispose of it under the supervision and control of the Probate Court, and to divide its proceeds between the creditors according to their rank; and if it could be for a moment admitted, that the proceeding complained of by the defendant was within the powers and authority of the federal court, it would have the effect of destroying

Jones and others v. Hunter and another.

at once all the legal privileges recognized by our laws, and create new and superior privileges where none can exist. It is clear, that the federal court was without jurisdiction to issue the execution complained of, and the Marshal of the United States was without authority to carry it into effect. The doctrine is well recognized, that "the local laws of the States of the Union, can never confer jurisdiction on the courts of the United States; and that they can only furnish rules to ascertain the rights of the parties, and thus assist in the administration of the proper remedies, where the jurisdiction is vested by the laws of the United States." 11 Peters, 175.

We must hold again, as we did in the two cases above alluded to, that the property of the succession of Jesse Harper, could not be seized by the Marshal of the United States, and that the sale thereof made by him to the plaintiff, under the execution issued against the curator of the said vacant and insolvent estate, is a mere nullity.

It is, therefore, ordered, that the judgment of the District Court be affirmed with costs; without prejudice to the right which the plaintiff may have to claim and recover of the estate of Jesse Harper, whatever amount he may have paid to the Marshal as the price of his purchase for the benefit of the succession.

CHARLES JONES and others v. JOHN E. HUNTER and another.

It is not necessary that a testament made in another State should be executed according to the forms prescribed by our laws to have effect here. It is sufficient that it be clothed with all the formalities prescribed for its validity in the place where it was made, by the laws of which its form is to be governed. C. C. 1589.

Where a will executed in another State has been admitted to probate there, by a court of competent jurisdiction, it will be presumed that the formalities required by the laws of that State were complied with, and that the judgment of the court was rendered after due and legal proceedings. No objection that it was not proved according to those laws will be listened to.

An omission to state, in the certificates appended to an exemplification of a will and of the probate thereof in another State, that the Judge who certifies to the correctness of the copy is the *presiding Judge*, is immaterial, where it is well known that

Jones and others v. Hunter and another.

the Probate Courts of that State are composed of but a single Judge. Act of Congress of 26 May, 1790.

Though a will, made in another State according to its laws, may have effect and be executed here, its dispositions or effect, where the property disposed of is situated here, must be governed by our laws—*lege rei sitæ*—not by the law of the place of its execution. C. C. 10, 483.

The acknowledgment of an illegitimate child in a will, is sufficient to entitle such child, when not a colored one, to be considered a duly acknowledged natural child, and to receive as such. C. C. 221, 226, 227.

Art. 1589, of the Civil Code, creates no exception to the rule, that the transmission of immoveable property situated in this State, whether by inheritance or testamentary disposition, must be according to our laws.

A disposition in favor of a natural child or children, cannot exceed one-fourth of the property of the testator, if he leave a legitimate brother or sister, or one-third, if he leave more remote collateral relations. C. C. 1473. The remainder of his estate must go to his legitimate relations. Ib. 1474.

APPEAL from the District Court of Concordia, Curry, J.

SIMON, J. This is an action of revendication. The circumstances under which this suit was instituted are as follows: John Jones died in Claiborne county, Mississippi, in the year 1833. At the time of his death, he was seised and possessed of certain property situated in the parish of Concordia, consisting of tracts of land, forming a plantation which he cultivated, and a certain number of slaves, and personal property, which were all inventoried by the Judge of the parish of Concordia, on the 7th of October, 1833, as composing part of the estate of the deceased. It appears, that the deceased left neither ascendants nor descendants. The plaintiffs, (five in number,) who represent themselves to be the brothers of the half blood, and lawful heirs of John Jones, have instituted this suit to recover the property left by the deceased in the parish of Concordia, which property is alleged to be in the possession of John E. Hunter, and Thompson L. King, who hold it, and claim to be owners thereof. In the mean time, they call upon the defendants, and one John Briscoe, to produce in open court the titles to the said property.

The defendants, in their answer, plead first the general issue, specially denying the heirship alleged by the plaintiffs, and set up title to the property sued for, by purchase from John Briscoe, whom they call in warranty.

Jones and others v. Hunter and another.

In the mean time, one William T. Proud, as tutor of Susannah Jones, presented his petition of intervention, in which, without joining either of the parties, but opposing both, he claims the whole estate for the minor : 1st. On the ground, that she is the duly acknowledged natural child of the deceased, and that, by operation of law, the whole succession devolved upon her by irregular succession ; and 2d. On the ground, that by the last will of the deceased, made and executed in Mississippi, and duly proved and registered before the Probate Court of Claiborne county, in said State, and since duly recorded and ordered to be executed by the Court of Probates of the parish of Concordia, she was instituted the only heir of the deceased, and is entitled to recover the whole amount of his succession.

To this petition of intervention, the plaintiffs answered by a general denial ; and by denying specially, the heirship of Susannah Jones. Two of the plaintiffs having died during the pendency of the action, their deaths were suggested, and their representatives called in the suit, and made parties plaintiffs.

We next find in the record, the intervention of Lewis A. Collier, asking to be substituted in the place of the defendants Hunter & King, to all whose rights in the property in dispute, he claims to have succeeded by virtue of his purchase at a Sheriff's sale made in March, 1841, by which, he alleges, he has become the only true and lawful owner of all of the said property. Two amended petitions were subsequently filed by Collier.

John Briscoe, who had, in the mean time, been called in warranty by the defendants, filed his answer contained in a petition of intervention, wherein he claims the property by virtue of a sale by public act, made to him by Eliza Jones, wife of one Bass, who, it is alleged, was the only collateral relative (sister) of the full blood, *in esse*, at the death of the said John Jones. He prays to be recognized as the only true and lawful owner of the property, and that L. A. Collier, who has the whole of it in his possession, may be condemned to account to him for all the fruits and revenues to the amount of \$36,000, and to pay him \$20,000, damages, &c.

Divers interlocutory proceedings were had during the progress of this suit ; several motions were made and overruled ; and, at last, the parties went to trial before a jury, who returned a verdict

Jones and others v. Hunter and another.

in favor of the intervenor, Susannah Jones ; finding further, that the rents of the property sued for, were of a value equal to that of the improvements placed upon the property in dispute.

Collier moved for a new trial by two separate motions ; and presented an affidavit to show, that since the trial, he had discovered new and important evidence, &c. The plaintiffs also moved for a new trial, on the ground, that the verdict was contrary to law. All these motions were overruled, whereupon the Judge, *a quo*, rendered a judgment of nonsuit* against the plaintiffs, and in favor of Proud, tutor of Susannah Jones, and against L. A. Collier, who, in said judgment, is called the defendant, for the property ; and from this judgment, the plaintiffs and Collier have appealed.

After a careful inspection and perusal of the record, our attention has been called to several bills of exception, which it contains ; and particularly, to those taken to the charge of the court, *a qua*, to the jury, in relation to the effect of the will of the deceased, produced in evidence by the intervenor, Proud, in support of the title set up under it by him for his ward. This will appears to have been executed in the State of Mississippi, by John Jones, who declares therein, that *his residence is in Louisiana* ; and was so executed in the presence of three witnesses. This testament was admitted to probate in Mississippi, after the Court of Probates had heard the evidence of one of the witnesses to the will to prove its execution, and a judgment was regularly rendered by which it was ordered, that said will be received and recorded. On presentation of a copy of the will and of the probate and record thereof, had in the State of Mississippi, the same was ordered to be admitted to record and executed by the Judge of the Court of Probates, of the parish of Concordia, in compliance with the provisions of our law, contained in arts. 1681 and 1682, of the Civil Code. Thus, the will under consideration became a matter of record in Louisiana, to have its effect here, provided the dispositions therein contained, are valid, and made according to our laws.

* The judgment was an absolute one against the plaintiffs. R.

On the production of a copy of the will and proceedings in evidence in this cause, several objections were made to them by all the other parties to this suit, founded in substance upon the grounds : that *said will was not clothed with the formalities required by the laws of Louisiana, that it was not duly proved according to the laws of Mississippi, and that the authentication of the document produced was not in conformity with the laws of Congress, &c.*, all which objections were overruled by the lower court; and the opponents having offered to prove by the laws of Mississippi, which they offered in evidence, that the probate of said will was not made in conformity with those laws, the latter were rejected by the Judge, *a quo*.

I. Art. 1589, of the Civil Code, provides, that "testaments made in any of the States of the Union, shall take effect in this State, if they be clothed with all the formalities prescribed for their validity in the place where they have been respectively made." Thus, it is not necessary, that a will should be made according to the forms prescribed by our laws, if executed in another State, and its form is to be governed by the laws of the place where it is made. 5 Mart. N. S. 48. Here, it is not objected, that the will is not made according to the laws of Mississippi; and, therefore, we must presume, that it was made in due form there, since it received the sanction of a competent court of that State.

II. The objection, that it was not proved according to the laws of Mississippi, was properly overruled. The will was admitted to probate by a court of competent jurisdiction; and, in such case, we have always held, that we will presume that the formalities were regularly complied with. In this case, therefore, we must take for granted, that the Court of Probates of Mississippi, acted in conformity with the laws of that State; and that its judgment was rendered after due and legal proceedings.

III. The record of the probate of said will appears to be properly authenticated. It is duly certified by the Clerk of the court, "that the transcript contains a true copy of the last will (and probate thereof,) of John Jones, as the same appears of record in his office," and the certificate of said Clerk is duly attested by the Judge of the Probate Court, in and for the county,

&c. It is true, that the Judge is not stated to be *the presiding Judge*; but this is, in our opinion, immaterial in this cause, as it is well known, that the Probate Courts in Mississippi, are composed of but one Judge.

Having thus disposed of the principal objections made to the form of the evidence, we have now to inquire into the effect of the will in question under our laws, and this necessarily leads us to an examination of the charge of the court to the jury, as excepted to by the parties whose interest is adverse to the execution of the will.

The Judge, *a quo*, instructed the jury, substantially, as follows: 1st. That under the 1589th art. of the Civil Code, a will made in due form, in another State, according to the laws of that State, can have effect in Louisiana. 2d. That the disposition in this will must be governed by the laws of Mississippi; and that, having been duly probated there, and also ordered to be executed here, it consequently operates on the property of the testator situated in Louisiana. 3d. That the will itself contains a full acknowledgment by the testator of the intervenor as his natural daughter. 4th. That the laws of Mississippi should govern in relation to wills, and dispositions of property by will in that State. 5th. That if the will contains dispositions which are prohibited by our laws, as being contrary to good morals or otherwise, such dispositions can have no effect; but that it is different if the testator in his will, only makes a different disposition of his property from that provided by our laws, and such disposition should have effect, unless positively prohibited. 6th. That although our laws provide, that transmission, by inheritance, of immoveable property situated in the State, by persons residing out of it, must be made according to our laws, *the case of dispositions by will, and inheritances by instituted heirs under the will, seems to form an exception* by the art. 1589, of the Civil Code; and he concluded by recommending to the jury, to give to this will such effect as it imports on its face, &c.

These charges were excepted to by the plaintiffs' counsel, who called upon the Judge, *a quo*, to desist from charging the jury as above set forth; and the Judge having refused to comply with this request, the counsel took a bill of exceptions.

1st. The Judge was correct in this charge. We have already disposed of this point, and said, that under the art. 1589, by him cited, a will made in another State, in the form required by the laws of that State, can take effect in Louisiana.

2d. The Judge, *a quo*, in our opinion, erred. Although a will may be made in another State, according to its laws, *to have effect in Louisiana*; and although it may be executed here, if found to be in due form according to the laws of the State where it is made, it does not follow, that its dispositions, or its effect are to be governed by the laws of the place where the will was made, when the property disposed of is situated in Louisiana. Such dispositions must be governed *lege rei sitæ*, and our Code contains positive provisions to that effect. Art. 10, of the Civil Code, says, that "the effect of acts passed in one country, to have effect in another country, is regulated by the laws of the country where they are to have effect;" and art. 483, of the same Code, provides, that "persons who reside out of the State," (*a fortiori*, those who reside in it,) "cannot dispose of the property they possess here, in a manner different from that prescribed by its laws." Here, the property bequeathed by the testator to Susannah Jones, is *all situated in this State*; and it is clear, that her capacity to receive, and the extent of the disposition made in her favor, should be regulated by, and according to the laws of Louisiana. This doctrine is so well settled in our jurisprudence, and the terms of our laws are so positive, that we are at a loss to conceive how the Judge, *a quo*, could, for a moment, entertain the opinion as expressed by another charge, that the art. 1589, formed an exception to the rule which he appears to recognize, to a certain extent, in his sixth charge.

3d. The fact, that Susannah Jones is the illegitimate child of the testator, is by him acknowledged in the testament. This may perhaps be sufficient to entitle her to be considered as a duly acknowledged natural child; as, from the terms of art. 221, of the Civil Code, which points out one of the forms of acknowledgment, it is implied, that other proof of acknowledgment may be admitted, if the natural child is not a colored one. We think that this acknowledgment is sufficient to give her capacity to receive, as a natural child duly acknowledged. See the Civil Code, arts.

226, and 227 ; the last of which provides, that the proof of acknowledgment may result from the father's having, by all kinds of private writings, *acknowledged* the bastard as *his child*, or from his having called him so.

4th. This charge is undoubtedly correct, with regard to property situated in the State of Mississippi ; but incorrect, if made to apply to property situated in Louisiana.

5th and 6th. These instructions are clearly incorrect. Art. 1589, of the Civil Code, contains no such exception as that stated by the Judge, *a quo*, to the jury ; and we have already demonstrated, that the transmission, by inheritance, or testamentary disposition, of immoveable property, situated in this State, must be made according to our laws. Now, in this case, the disposition contained in John Jones' testament, by virtue of which the intervenor, Proud, claims the estate in favor of the minor Susannah, extends to one-half of all the property, real and personal, which he possesses in Louisiana. Such a disposition, in favor of an acknowledged natural child, could not, by the terms of art. 1473, of our Code, exceed one-fourth of his property, if he leaves legitimate brothers or sisters, and one-third, if he leaves more remote collateral relations. Thus, it is clear, that if the plaintiffs, and Eliza Bass, or either of them, have succeeded in showing that they are the legitimate brothers and sisters of the testator, the disposition in favor of Susannah, should be reduced to one-fourth ; and the balance of the estate of the deceased, that is to say, the three other fourths, should go to his legitimate relations. Civil Code, art. 1474. Where did the lower Judge find, that according to the laws of Mississippi, the testator could dispose of the whole in favor of his natural child ? Those laws were not proved on the trial ; and again, the disposition can not be governed by any other laws than those of Louisiana.

With this view of the District Judge's instructions to the jury, we have abstained from expressing any opinion upon any other part of the case, as it must be remanded to the inferior tribunal, to be tried, *de novo*. We have not deemed it necessary to examine the points arising from the motions made for a new trial ; as, from the opinions above expressed, the parties who complained of the verdict, have attained their object, and will have the benefit

Terrell v. Chambers.

of submitting their respective pretensions to a new jury, before whom they will have an opportunity of producing the newly discovered evidence, which was one of their grounds for obtaining a new trial.

With regard to the right of Susannah to recover the property, as inherited by irregular succession.—This is a distinct title which can only prevail, in case the plaintiffs, and Eliza Bass fail to convince the jury, that they are the legitimate relations of the deceased. This is a matter of fact peculiarly within the province of a jury, whose verdict we are always disposed to maintain, on such questions, unless manifestly erroneous.

It is, therefore, ordered, that the judgment of the District Court be annulled, and reversed ; and it is ordered and decreed, that this cause be remanded to the inferior court, for a new trial, with instructions to the Judge, *a quo*, to desist from charging the jury in the manner complained of by the appellants ; and to instruct said jury according to the legal principles established and recognized in this opinion. The costs in this court to be borne by the intervenor and appellee.

Mayo and Dunlap, for the plaintiffs and appellants.

Stockton and Copley, for the intervenor and appellant, Collier.

F. H. Farrar and Stacy, for the intervenor, Prôud, tutor.

Snyder, for the warrantor.

Bemiss, for the defendants.

HOLCOTE TERRELL v. JOSIAS CHAMBERS.

The decisions of the Register of the Land Office and Receiver of Public Moneys in Louisiana, in relation to confirmed land claims which may conflict or interfere with each other, under the powers conferred by sixth section of the act of Congress of 3 March, 1831, are not binding on the parties. The act does not take from the courts the right of investigating and deciding on such claims, after those officers have acted thereon.

APPEAL from the District Court of Rapides, *Campbell, J.*

Hyams, for the plaintiff.

Brent and O. N. Ogden, for the appellant.

GARLAND, J. This is an action to recover a portion of land, to quiet the plaintiff in his possession, to establish a boundary, and to recover damages for slander of title and trespass. The case was before the court at the October term, 1838, (12 La. 582,) and was remanded for a new trial. The question of title was not considered by the court, although acted on below—that of damages being most prominent. The consequence was, that the whole judgment was reversed, although there was no doubt about the title being in the plaintiff.

On the 21st of January, 1819, at the sale of the community property of Abraham Martin and wife, made by order of the Court of Probates, Walter Turnbull became the purchaser of two tracts of land on the left bank of the bayou Robert, one containing 200 *arpens*, purchased from Jeremiah Dowd, the other containing 400 *arpens*, purchased from Patrick Gurnett. At a Sheriff's sale, made on the 6th of March, 1823, John Towles purchased the whole tract of land, under an execution in favor of Mrs. Matilda A. Turnbull, which purchase was for the use and benefit of the latter. On the 19th June, 1824, M. A. Turnbull, authorized and requested Towles to convey to Nathaniel Cox, so much of the land, including the dwelling house and gin, as would be sufficient to pay a debt to him owing by her husband, estimating the improvements at \$4500, and the land at \$15 per *arpent*. On the 21st of October, 1826, Towles sold William Miller 300 *arpens*, more or less, stating it to be bounded above by the land of Baldwin, and below by that of Nathaniel Cox. This sale Mrs. M. A. Turnbull ratified two days after. The sale from Towles to Cox was not made until May 14th, 1827, in conformity with Mrs. Turnbull's authorization, dated in June, 1824. He then conveyed 294½ *arpens* of the land, without saying how it was bounded. Miller sold the portion of the land he purchased to Carnal, who sold to the plaintiff and described it as being bounded below by the estate of Harvard. Cox, on the 9th December, 1828, sold to John Harvard, the land purchased of Towles. At the sale of Harvard's estate, on the 13th January, 1830, Chambers purchased the Cox tract, which is stated to be bounded above by the land of Terrell. On the same day, the defendant

purchased another tract of Harvard's estate, which is described as beginning at a gully on the bayou, being the lower corner of the Cox tract, thence running down the bayou to the lower corner of the gin lot, so as to include the gin, thence running out to the back line of the whole tract, so as to include the quantity of 690 *arpens*, more or less, being one-half of the tract purchased of McCrummen. On the same day, the defendant purchased another below the last one, containing the same quantity, being the other half of the McCrummen tract. In the sale from McCrummen to Harvard and Calliham, dated in October, 1823, the land of Turnbull is stated to be the upper boundary.

The defendant claims, that his titles cover all the land owned by Terrell. He alleges, that he is entitled to the whole of the Turnbull tract sold by Towles to Miller and Cox, although he owns but the portion purchased of Cox. He claims the land in this mode, because he has, by some means, obtained from the Register of the Land Office at Opelousas, one or more patent certificates, in which it is stated, that he, as the assignee of Abraham Martin, has been confirmed as owner of the tracts claimed under Gurnett and Dowd. These certificates, it is pretended, were obtained in consequence of some proceeding instituted under the 6th section of the act of Congress, passed in 1831, authorizing the Register and Receiver to pass upon conflicting claims and boundaries. 2 Land Laws, 294. By that act, courts of justice are not precluded from investigating and deciding upon such claims, after the Register and Receiver have acted. The defendant does not produce any chain of title from Abraham Martin, except for the 294½ *arpens*, which he holds under Harvard, which are situated above the gully. For the lands below the gully, he traces his title no further back than to McCrummen. It seems, that the quantity sold in the two lower tracts by Harvard is deficient; and it is shown, that the defendant claimed and had a large deduction made from the price in consequence of it. He now wishes to push the Cox tract up to Terrell, and then bring up his other tracts, so as to get the quantity his deeds call for.

The District Court decided against him, and he has appealed. We do not think the court and jury erred. We do not see a

Fellows and another v. The Commercial and Rail Road Bank of Vicksburg.

shadow of claim, that the defendant has to more than 294 $\frac{1}{2}$ *arpens* of land above the gully, commonly called the Supreme Court gully, having such a front as, by the depth of forty *arpens*, will give that quantity. The recital in the certificate of confirmation, of his being the assignee of Abraham Martin, is not binding on the plaintiff, without a production of titles.

The question now before us seems to have been correctly settled in the case of *Turnbull & Cureton*, 9 Martin, 41. The gully was then fixed as the lower boundary of Gurnett's tract, and the upper limit of the Tear tract.

Judgment affirmed.

WILLIAM FELLOWS and another v. THE PRESIDENT, DIRECTORS
AND COMPANY OF THE COMMERCIAL AND RAIL ROAD BANK
OF VICKSBURG.

By the common law a debtor may make a valid assignment for the benefit of his creditors, and may even give preferences to a certain class of them, and it is no objection to such an assignment, that it defeats the legal remedies of all other creditors, though a majority in number and value, unless there be some provision of a bankrupt law to invalidate the deed. But the assignment must be absolute and unconditional, the assignor neither retaining power to change the trustees, nor a control over the deed of trust.

By the common law the assent of creditors will be presumed, in case of an assignment to a trustee for the benefit of all the creditors, where no release or other condition is stipulated by the debtor, and the property is to be distributed among all the creditors *pro rata*. This assent is presumed on the ground, that the trust must be for their benefit.

The defendants, a corporation created by another State, in which the common law prevails, for the purpose of banking and constructing a railway, made an assignment of all their property to certain trustees. By the deed of assignment, among other things, it is declared, that the trustees shall be the joint agents of the corporation and of such of the creditors as may become parties thereto; that they shall render semi-annual accounts to the assignors; that the latter retain the right of substituting a new trustee in case of vacancy; and that the trustees shall borrow a sum of money for the completion of the railway within the time prescribed by the charter, for the purpose of saving the property and the charter from forfeiture, the amount to be repaid by preference, out of the effects assigned, and its re-payment secured by a lien on the real estate of the corporation; the deed reciting the inabil-

Fellows and another v. The Commercial and Rail Road Bank of Vicksburg.

ity of the corporation from the pressure of its debts, to raise the means of completing the road, as the principal cause for making the assignment. There was no schedule of the creditors, nor specification of the property intended to be conveyed. The Directors reserved the right of controlling the trustees in relation to claims against the corporation of a doubtful character. In an action by plaintiffs, creditors of the corporation, who had never expressly assented to the assignment, commenced by attachment of a debt due to the corporation in this State: *Held*, that many of the stipulations in the deed are inconsistent with the idea of a *bona fide* assignment, by which the legal title of the property of the debtors is to be vested in trustees for the benefit of the creditors; that it is rather the creation of an agency to manage the affairs of the corporation, under the supervision of the Directors, for the purpose of completing the road; that it is not such an assignment as would be valid by the common law; and that the assent of the plaintiffs, as a part of the creditors, cannot be presumed. Attachment maintained.

APPEAL from the District Court of Madison, *Curry, J.*
Stockton and Bemiss, for the plaintiffs.

T. N. Peirce, for the appellants.

BULLARD, J. This is an action commenced by attachment against the Commercial and Rail Road Bank of Vicksburg, to recover the amount of certain certificates of deposit, amounting to about \$6000. The attachment was levied, as it appears, by the Sheriff's return, upon a debt due by O. B. Cobb, to the defendants, by virtue of several promissory notes held by the defendants against the garnishee, amounting to about thirty-five thousand dollars.

The counsel appointed by the court to represent the absent debtors, after making a motion to dissolve the attachment, which was overruled, answered, that no property or effects belonging to them had been attached; that the debt formerly due by Cobb to them, was, on the 13th day of February, 1840, transferred, assigned, and delivered, for a valuable consideration to Bodley, Frazier and Robbins, together with all the other property, effects and assets, then belonging to the defendants, for the benefit of their creditors generally, and that no one creditor should have an advantage over others, and that the notes, bills of exchange, &c., due by Cobb were on that day delivered to the said trustees, of which due notice was given to said Cobb, before the institution of this suit. This plea is preceded by a general denial.

The persons above named as trustees, intervened in this suit, except Frazier, who it is alleged was re-placed by Walker, with

Fellows and another v. The Commercial and Rail Road Bank of Vicksburg.

the consent of all concerned. They set forth the same assignment referred to by the bank, and allege, that it is valid by the laws of Mississippi, and by the charter of the Bank. They refer to copies of the assignment as part of their petition of intervention. They allege, that all the notes, other evidences of debt, and property, were transferred and delivered to them, and that they are the legal holders and owners of the same. They further allege, that the debt due by Cobb was at the same time transferred and assigned to them, and that the debtor had notice of the assignment before the inception of this suit. They, therefore, pray to be decreed the true owners and holders of said debt, and that the attachment may be dissolved, and for general relief.

It is admitted of record on the part of the plaintiffs, that the assignment was executed by due authority. That Walker has been substituted for Frazier, as assignee; that all the effects including all notes, bills, and other evidences of debt, among which were those due by Cobb, were delivered over to the assignees on the day of the assignment; that notice of the assignment was published in two newspapers in Vicksburg, and in two newspapers in New Orleans, for the space of one year after the date of the assignment; that the fact of the assignment was publicly spoken of in and about Vicksburg, and the surrounding country; and that Cobb resides twenty-five miles from that place, and was frequently in Vicksburg, in 1840. On the part of the defendants and intervenors, it is admitted, that the certificates of deposit were duly executed by the proper officers of the Bank. The signatures and official character of Bibby, the Cashier, is admitted; and that his certificate or statement, without oath, is to be received as evidence of the amount that Cobb owed the Bank, at the time of the assignment, and whether he has paid any part since, or of any thing which he may have done, or proposed in relation to the debt.

The judgment below was for the plaintiffs against the original defendants and the intervenors, and they have appealed.

The principal question which the case presents, and which has been argued in this court is, whether the assignment by the Bank to the intervenors, be valid according to the laws of the State of Mississippi, and whether it has been so notified to the garnishee

Fellows and another v. The Commercial and Rail Road Bank of Vicksburg.

Cobb, as to place the debt due by him to the Bank, beyond the reach of its creditors, and the plaintiffs' attachment.

It becomes thus necessary to state the substance of the instrument, in virtue of which, the intervenors claim the property attached, as the assignees of the Bank.

It is recited in the instrument, that, whereas the embarrassed situation of the President, Directors and Company of the Commercial and Rail Road Bank of Vicksburg, and the inability of its debtors to meet their liabilities, put it out of their power to *complete the Rail Road*, or to pay its debts, without having time to make collections; and whereas, the unprecedented pressure which now rests upon the community, and the utter impossibility of the corporation to collect its debts immediately, without being destructive to the best interests of its debtors, as well as of the corporation, render it necessary, (in order that justice may be done to all the creditors, and *in order to complete the Rail Road*, which was the great and primary object for which the charter was granted,) that an assignment of the property, debts and effects of said corporation should, at once, be made, for the benefit of the creditors, as will most effectually promote the interests of the creditors, and protect the debtors from loss and sacrifice; and at the same time furnish the means to finish and complete the Rail Road, and to protect and secure to the stockholders the franchise granted by the charter. For these reasons, the President, Directors, &c., in consideration of the premises, and of five dollars in hand paid, &c., declare that they have given, granted, bargained, sold, assigned, transferred, and set over, to W. W. Frazier, Thomas E. Robbins, and William S. Bodley, and the survivor of them, all the property, real, personal, and mixed, which either in law or equity belongs to them; to wit, its real and personal estate of every kind, or description, situate in the county of Warren, and State of Mississippi, or elsewhere, its stocks, goods, wares, merchandize, bills receivable, bonds, notes, book accounts, claims, demands, judgments, choses in action, and all its property of every kind and nature whatever, enumerated and specifically mentioned or not; and they further bargain, transfer and assign to the said assignees, all the surplus profits, hereafter arising, or which may hereafter accrue from the said Rail Road, after the time said Rail

Fellows and another v. The Commercial and Rail Road Bank of Vicksburg.

Road is finished and completed, to Jackson, that is to say, all the profits which may thereafter be received over and above the necessary disbursements of the road, including officers' salaries; and in order more effectually to carry this provision into effect, the said trustees or any hereafter to be appointed, are hereby declared to be the joint agents of the party of the first part, and of all the creditors of said corporation, and as such agents, they are authorized to take possession of said road, and control the same for the purpose of completing the same, and to receive the profits and issues thereof; provided however, the horses, slaves, wagons, carts, mules, oxen, iron engines, and implements of every kind now engaged in working on, and constructing the Rail Road are not hereby intended to pass to said assignees, and are hereby exempted and excepted out of the provisions of the deed. This assignment is declared to be in trust for the following uses and purposes,—that the trustees shall proceed in the manner they think proper, to sell and dispose of, either at private sale, or by auction, the real and personal estate, goods and stocks, hereby conveyed to such person or persons, and for such prices as in their judgment may appear best for the interest of all concerned; and to collect and hold the proceeds of said sales, and also to collect the debts due, and the profits of the Rail Road after the time of its completion to Jackson; provided they shall never refuse to receive from the debtors of the Bank, its bank notes, or other evidences of its liability, in payment of debts, provided such debtors shall give sufficient security for the amount of their debts, within twelve months after the registration of this deed of trust. It is further stipulated that in all cases, when security is not given, it shall not be compulsory on the trustees to institute suits immediately, but they may give further indulgence, or compromise, or settle in such manner as will best secure the same. The trustees are to pay all reasonable expenses and charges for making and carrying into full effect this assignment, and in doing so, may employ one or more attorneys, agent or agents, who shall be paid out of such proceeds; and it is stipulated that the trustees shall retain for themselves out of the proceeds as a compensation for their trouble, at the rate of \$8000 each, per annum in full for all services in managing said corporation. It is then declared, that,

Fellows and another v. The Commercial and Rail Road Bank of Vicksburg.

whereas it was the principal object of the legislature in granting the charter, that the Rail Road should be completed ; and whereas, if it is not completed within the time limited in the act of incorporation, the charter will be forfeited as well as the road itself, now therefore, with a view to prevent irreparable injury to the creditors of said company, it is stipulated and agreed, that the trustees shall, and they are authorized, and it is made their duty to borrow in the name, and on behalf of said company such sums of money as may be necessary to complete the Rail Road to Jackson, not exceeding \$250,000, and the property assigned is to be bound for such loan, with interest. Therefore, in the first place, out of the nett proceeds the trustees shall pay off and discharge in preference to all other claims, or demands, such amount, not exceeding \$250,000. With the remainder of the nett avails the trustees are to pay all the liabilities of the Bank, except the stockholders ; and should the fund not suffice to pay all the debts and liabilities of the institution in full, then it shall be applied so as to pay a *pro rata* ; but if a balance should remain, it is to be refunded to the bank : provided that no creditor shall be permitted to participate in the payment, except upon the conditions and terms set forth in this deed, the substance of which is, that publication is to be made to notify all the creditors to file their claims within twelve months, and all who shall so file their claims shall be considered as parties to the assignment, and at the end of twelve months, all the proceeds, after first paying the loan, should it be made, shall be divided equally in proportion to the amount of their claims, and every six months afterwards, the trustees are to proceed and make dividends, provided that creditors may file their claims at any time, but shall only come in for future dividends. The Board of Directors reserve to themselves the right of approving or disapproving of doubtful claims, and the creditors are required, except as to a particular class of debts, to present them to the Board of Directors, or a Committee for their approval ; and whenever suits are brought on claims rejected, if such claimants shall notify the trustees that suit has been commenced, they shall be considered parties to this deed from that time, and if they recover shall be entitled to dividends with the other creditors. The deed makes other provisions in relation to the distribution

Fellows and another v. The Commercial and Rail Road Bank of Vicksburg.

among the creditors, not necessary to mention in detail, and goes on to require that the trustees shall exhibit to the Board of Directors, semi-annually, a statement of their accounts. It provides for the appointment of a successor, in the event of the death or resignation of one of the trustees, by the Bank; and finally, it is repeated, that this deed embraces all the property of the Bank, and its branches, and that any liens which may exist on any of the property shall be discharged by the trustees out of the fund.

There is a second or supplemental deed of assignment or trust, bearing the same date with the above, repeating many of its clauses and stipulations, and declaring the trustees to be the joint agents of the Bank, and such of its creditors as may become parties. The President and Directors, sell to the trustees all the slaves, &c., engaged in finishing the road, which had been expressly reserved by the first deed, and make further specific provisions for the finishing of the road; in order to save the franchise granted by the charter. It is declared to be the main and principal object of the deed to secure to the creditors of the institution the benefit and advantages of the road, and, by completing the same, to afford facilities for the payment of the debts of the Bank.

The validity of this assignment depends upon the law of the place where it was entered into, although intended to operate upon personal property in this State. We shall, therefore, inquire into its form and effect, only so far as it concerns the creditors in relation to debts due to the corporation by our citizens. Whatever may be thought of it, as the means of carrying on the operations of the corporation by agents and trustees, instead of acting by a board of Directors, and thereby attempting to act in a different manner from that indicated by its charter, it is only the right of the creditors of the Bank to attach the property purporting to have been assigned, which is to be examined by us. It is admitted, that the common law prevails in the State of Mississippi, and, consequently, we are to look into approved works upon that system of jurisprudence for information on this subject.

It seems to be well settled at common law, that a debtor may make a valid assignment for the benefit of his creditors, and that he may even give preferences to a certain class of them; and it is

Fellows and another v. The Commercial and Rail Road Bank of Vicksburg.

no objection to an assignment, that it defeats all other creditors of their legal remedies, even if amounting to a majority in number and value, unless there be some provision of a bankrupt law to invalidate the deed. 11 Wheaton, 78.

It appears also to be settled, that the assent of creditors will be presumed, in the case of an assignment to a trustee for the benefit of all the creditors, where no release, or other condition is stipulated for, on behalf of the debtor, but the property is to be distributed among all the creditors *pro rata*. This assent is said to be inferred upon the general principle of law, because the trust must be for their benefit, and cannot be for their injury. 4 Mason, 206.

The assignment should also be absolute and unconditional, the assignor neither retaining a power to change the trustee, nor a control of the deed of trust. 12 Johns. Rep. 71. 11 Wendell, 202.

In the assignment or deed of trust under consideration, it is expressly declared, that the assignees or trustees are the joint agents of the Bank, and such of the creditors as may become parties; and they are required to render semi-annual accounts to the assignors, and the right is retained, and appears by the record to have been exercised, of substituting a new trustee in case of vacancy. The assignees are authorized to retain, out of the proceeds of the property, an enormous salary of \$8000 each. It provides for the borrowing of \$250,000, and subjecting their real estate to a lien for its reimbursement, and the amount to be paid out of the avails of the effects assigned; thus treating the property as if still that of the corporation, and providing for the creation of a new debt to be paid in preference, in order to complete the Rail Road, and thus save the franchise to the stockholders, and that the road itself when finished, may afford the means of paying the debts of the Bank. Thus a large fund is locked up from the pursuit of creditors; and, indeed, it is set forth as the principal cause and inducement for making the assignment, and appointing trustees, that the pressure of debts put it out of the power of the corporation to complete the Rail Road, and to provide the ways and means of doing it, in preference to paying those debts out of the sale of all the property of the assignors. The creditors are told that this is done for their benefit, because all the profits of the

Fellows and another v. The Commercial and Rail Road Bank of Vicksburg.

road when completed, will be for their use. Many of these stipulations appear to us inconsistent with the idea of a *bona fide* assignment of the property of a debtor, by which the legal title is vested in the trustees for the sole benefit of the *cestui que trust*. It appears to be rather the creation of an agency to manage all the affairs of the corporation under the supervision of the Board of Directors, for the avowed primary purpose of completing the road by deferring and throwing obstacles in the way of its creditors, by devoting a large sum to that purpose, in preference to paying the creditors. The assignees are what they are called in the deed, the agents of the corporation, and of such of the creditors as may accede to the terms offered in it; but we do not think ourselves authorized to infer the assent of the plaintiffs as a part of the creditors. The absence of a schedule of the creditors, and of any specification of the property intended to be conveyed, and the fact that the Bank reserves also the authority to control the trustees in relation to doubtful claims, confirm us in the opinion, that this is not such an assignment of property for the benefit of creditors, as would be held valid by the laws of Mississippi. With the question whether that corporation can conduct its affairs by such agents, or trustees, and whether it amounts to an abuse of its powers as a corporation, we have nothing to do. That question concerns the State, and the corporation. The only question for us to decide is, whether the assignment in question placed the debt due by Cobb beyond the reach of a creditor, who never assented, and cannot be legally held to have assented to the deeds of assignment.

This view of the case renders it unnecessary to inquire into the question of notice given to the debtor.

Judgment affirmed.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF LOUISIANA,
IN THE
EASTERN DISTRICT, AT NEW ORLEANS,
COMMENCING, NOVEMBER, 1843.

PRESENT:

HON. FRANÇOIS XAVIER MARTIN.
HON. HENRY A. BULLARD.
HON. ALONZO MORPHY.
HON. EDWARD SIMON.
HON. RICE GARLAND.

**CICERO DAVIS v. NIMROD HOUREN and others, owners of the
steamer Hudson.**

Evidence taken in an action against the owners of a steamer, for an injury done to a vessel of plaintiffs by the steamer of the defendants, to which action the captain of the steamer is not a party, is not binding on him.

The proprietors of steam tow-boats, such as ply between New Orleans and the Gulf of Mexico, are common carriers, and responsible as such. But it does not follow, because the proprietors are responsible to others for the negligence or misconduct of all their agents and servants, that these are responsible to the proprietors for each other. Thus, the captain cannot be held responsible to the owners, for damages to which the latter were subjected in consequence of an injury to another vessel, resulting from mismanagement of the steamer during the pilot's watch, and when the captain was asleep. *Per Curiam.* It is physically impossible that the master of a vessel can always be on deck, and he cannot be held liable for every act or omission of the other officers.

The proprietors of steamers, such as are employed in towing vessels between New

Davis v. Houren and others.

Orleans and the Gulf of Mexico, are commercial partners. C. C. 2974. *Per Curiam*. It does not follow because these boats have no privilege for their hire, that their owners are not responsible in the same manner as the owners of boats differently employed. Privileges are arbitrary provisions of the law.

After the dissolution of a partnership, none of the members can bind the others, without special authority from them. Nor can they, after such a dissolution, bind the others, or the firm, for the payment of a debt which has been prescribed, any more than they can create an entirely new obligation.

An acknowledgment of a debt by any one of several debtors bound *in solido*, interrupts prescription as to all. The words *joint-debtor* in art. 3517 of the Civil Code, were inserted in the English text of the article through an error of the translator or transcriber.

APPEAL from the Commercial Court of New Orleans, Watts, J.

GARLAND, J.* This action is brought to recover the sum of \$1247 75, which the plaintiff alleges is due to him, for his wages and services as the master of a steam tow-boat called the Hudson, which belonged to the defendants, and was engaged in towing ships, and other vessels, to and from sea, and the mouths of the Mississippi, to the city of New Orleans and other places. The services commenced on the 20th of October, in the year 1839, and terminated on the 10th of July, 1840; and the compensation claimed is at the rate of \$166 66 per month.

The defendants, J. & G. Heaton, after a general denial, admit that they were interested in the boat in different proportions, but deny that they were commercial partners with Houren and Clark, their co-owners, and say, if they are at all liable to the plaintiff, it is only jointly, and not *in solido*. They specially deny that Houren was their agent, or partner, on the 1st February, 1841, as they had previously sold their interests in the boat; and they plead the prescription of one year against the demand. They then set up a demand in reconvention against the plaintiff, for a sum larger than he claims, because they say that, in the month of May, 1839, he, being then the master of their aforesaid boat, and having in tow six vessels of different classes, bound to sea, negligently and imprudently ran the boat ashore, whereby a Spanish

*BULLARD, J., took no part in the decision of this case, not having been on the bench at the time of the argument. SIMON, J., was absent both then, and at the time of the decision.

 Davis v. Houren and others.

brig called the *Merced*, and a schooner called the *Creole*, were much injured and damaged, for which they (the defendants) were compelled to pay \$1821 68 damages to the owners, as will appear by the records of two suits brought by the owners of the said vessels, in the Commercial Court, and the receipt for the money by their attorney. For answer to this demand, the plaintiff alleges that it was not by any fault or negligence of his that the vessels were injured; that subsequent to the period last mentioned, (May 6th, 1839,) he has had transactions and business with the defendants—has settled accounts with them, and that they never claimed these damages. He avers that they are not owing in any manner, and if ever they were, that they are prescribed by one year.

To the petition was annexed an account as follows:—

“New Orleans, February 1st, 1841.

“Steam Boat Hudson and Owners

To Cicero Davis, Dr.

“For services rendered on board of said boat \$1247 75

“Approved.

“NIMROD HOUREN.”

George and James Heaton and Houren continued to be the owners of the boat, until the month of December, 1840, when George Heaton sold his interest to the latter, and the *Hudson* was afterwards owned by Houren and James Heaton, and was so, at the time the above approval of the account was made. That the plaintiff was the master of the boat during the time mentioned, and that his wages were at the rate claimed, is sufficiently shown. It is in fact not seriously contested. The citations were served on the defendants, March 11th, 1841. Houren has not filed any answer, and the final judgment against him is not appealed from. In support of the plea in reconvention, the defendants produce the records and judgments in the cases of the owners of the *Merced* and *Creole* against them, which were settled by Houren paying one hundred dollars in cash, and giving his notes for the remainder. Neither of the Heaton shows that they ever paid any part of these judgments, nor that they have accounted for their portions in settlement with Houren. He makes no claim in reconvention, nor is he before us. The plaintiff was no party to the

suits of the owners of the vessels against the defendants, nor does it seem that he was even called by them as a witness; and the only evidence of any accident having happened, or damages being sustained, is the production of those records, and one witness, whose testimony does not sustain the allegation, but on the contrary rather goes to exculpate the plaintiff. In the trial of these cases the plaintiff was not heard; he had no opportunity of examining the witnesses, nor of justifying his conduct on the occasion for which it is alleged he is liable.

The court below rejected the demand in reconvention, and gave a judgment *in solido* against George and James Heaton for \$666 66 and the costs, and a separate judgment against Houren for \$581 09; and from the former, this appeal is taken. Both parties insist that the judgment is wrong, and ask us to correct it. The plaintiff says that he should have had a judgment for the whole amount of his claim; the defendants say that he is not entitled to any thing, and that they ought to recover the sum claimed in reconvention.

We are of opinion that the court below did not err in rejecting the demand in reconvention. It is not sustained by sufficient evidence given in this suit. We do not consider Davis as bound by evidence given in suits to which he was no party, and of the existence of which it is not shown that he was informed. Even if he were bound by the evidence, it is questionable whether it would make him responsible in damages to the defendants. The statement is, that the Hudson left the city with a very heavy tow—a ship on each side, and three schooners and the brig astern. The hour of departure was about half-past nine, P. M.: the night was clear, and all the witnesses say, a good one for going down the river. At a late hour the plaintiff went to bed. Between twelve and one o'clock a fog suddenly rose, and soon became so dense, that the shore, and objects at a little distance, could not be seen. The master of the Creole says, that he could scarcely see the vessel along side of him. The pilot, who is not shown to be incompetent, testifies, that he and the inferior officers, at the time, had charge of the deck, and that as soon as he found he could not navigate safely, he ordered the fires of the boat to be *wet* down, and hailed the vessels to put their helms a-port, and get their an-

chors ready ; that he then went to seek the captain, but as some one had fastened the cabin door aft, he was delayed some minutes, and was obliged to go forward, when he saw the loom of the land on the bows. The plaintiff was directly on deck, and ordered the vessels astern to star-board their helms, and at the same time cast off their hawsers from the boat. The schooner obeyed ; and all went clear ; but the officers of the Spanish brig not understanding the English language, did not obey, and consequently, the brig got wedged in between the boat and one of the ships, and was injured seriously. The plaintiff then, fearing that his boat would be greatly injured, cast off the ships and backed out, when one of the ships in drifting down stream struck the schooner and injured her. It was proved that sudden and dense fogs are frequent in that part of the Mississippi ; and that other tow-boats were running the same night, the officers of one of which saw the Hudson with her tow, a short time before the accident, and did not think there was then any danger. It is also shown, that the pilot who had charge of the boat at the time of the accident, was employed by George Heaton, before the plaintiff took command.

We think it not improbable, that the judgments in the cases against the defendants, for injuring the brig and schooner were correctly rendered, in conformity with the principles upon which the case of *Smith et al. v. Peirce et al.*, (1 La. 350,) was decided by this court. It was there held, that the proprietors of tow-boats were common carriers, and subject to all responsibilities as such ; but it does not follow, that, because the proprietors are responsible to others for the negligence or misconduct of all their agents and servants, that all these are responsible to the proprietors for each other. It was not the watch of the plaintiff when the alleged injuries were inflicted, but of another. It is physically impossible that the master of a vessel can always be on deck ; and it is not right that he should be responsible to his owner for every act or omission of the other officers. His liability is very great, but we are not disposed to carry it to the extent claimed.

The defendants contend that, the owners of tow-boats are not commercial partners, as we have often held that the owners of other steamboats are. We think otherwise. Although employed for hire in a manner somewhat different from boats navigating the

river above New Orleans, we do not think there should be a different responsibility on the part of the owners. In this case, it is proved, that their general business is to tow vessels to and from sea; to lighten and assist sea-going vessels over, and drag them off bars; oftentimes taking out their cargoes and carrying them to places of safety; sometimes carrying passengers, and taking freight up and down the river, transporting specie, &c. It is said that a vessel merely making trips from the city to the mouth of the Mississippi does not make a voyage, and that her owners do not come within the meaning of article 2796 of the Civil Code. A steamboat that goes to Lafourche, or Baton Rouge, transporting sugar or cotton in her hold or on deck, it is admitted, earns her hire by so doing, and makes her owners responsible as commercial partners; but if the same boat goes to the Balize, or to sea, earning her hire by towing five or six sea vessels, it is contended that she does not make her owners responsible in the same capacity, although a much greater interest and responsibility exist.

It is further said, that because this court have held, in 17 La. 162, that tow-boats have no privilege for their hire, therefore, their owners are not responsible in the same manner as owners of boats differently employed. We do not think this a logical conclusion. Privileges are arbitrary provisions of law, granted to secure the execution of certain kinds of contracts; but the character of the personal responsibility is not affected. A privilege is an accessory right, and although an obligor may not be entitled to it, he is not discharged from his liability.

The plaintiff complains that the court erred, in maintaining the defendants' plea of prescription for all the wages which were owing for one year previous to the institution of the suit. The defendants rely upon that portion of article 3499 of the Civil Code, which says, that the action for the payment of the wages of the officers, sailors, and others of the crew, of ships and other vessels, is prescribed by one year. The plaintiff says, that he is taken out of this clause, as Houren, one of the owners of the boat, had acknowledged and approved his account; and that he comes within the second clause of article 3500. To this, the defendants reply, that at the time this account was approved, the partnership between them and Houren had been dissolved, by his purchase,

in December, 1840, of all George Heaton's rights; and that he had no right to bind his former partners in any manner. This, we think, is clear. It is well settled, that after a partnership is dissolved, no one of the partners can bind the others without a special authority from them; and one has no more right after a debt is fully prescribed, to contract anew, in the name of the firm to pay it, than he has to create an entirely new obligation. In this case, Houren did not sign any partnership name, but his own; and this, the plaintiff contends, at least, interrupts the prescription, as it is an acknowledgment of one of the debtors *in solido* of the existence of the debt, and that the prescription only runs from the day of the interruption. In this, we think, the counsel for the plaintiff is correct. Article 3516 of the Code says, "that the prescription releasing debts is interrupted by all such causes, as interrupt the prescription by which property is acquired." Article 3486 says, that "prescription ceases to run, whenever the debtor or possessor makes acknowledgment of the right of the person, whose title they prescribed;" and we have but little doubt, that article 3517 was intended to cover the case in point: but in consequence of one of those frequent errors in translating the Code, the English text is different from the French, and does not in terms include debtors *in solido*, which the French text does. The French text says, that the acknowledgment of one of the debtors *in solido*, interrupts prescription as to the others, and their heirs. The words, *debiteurs solidaires*, are translated into English, *joint debtor*. We cannot see any reason for giving greater effect to the acknowledgments of a joint debtor upon his co-obligors, than to those of a debtor *in solido*. The provision in the English text, is at variance with the general provisions of the Code, in relation to the two classes of debtors, and we have no doubt it is an error of a translator or transcriber. This doctrine is asserted in positive terms by Pothier, Toullier, and other commentators and jurists. 1 Pothier, 217, No. 698. 3 Toullier, p. 474, No. 728; Brussels edition.

We are, therefore, of opinion, that the prescription only applies to the wages owing anterior to the 1st of February, 1840, instead of those previous to the 11th of March, of that year; which will entitle the plaintiff to recover, two hundred and twenty-six dollars

Bowles v. Lyon.

and eighty-three cents more than is allowed by the inferior court, and in this respect, we think the judgment should be amended.

It is, therefore, ordered and decreed, that the judgment appealed from be amended, and that the plaintiff recover of George and James Heaton, *in solido*, the sum of eight hundred and ninety-three dollars and forty-seven cents, with costs in both courts; but upon this judgment, and that rendered against Houren in the court below, the plaintiff shall only receive the sum of \$1247 75, for which sum Houren is bound in the approved account.

Perin, and *A. Walker*, for the plaintiff.

Wray, for the appellant.

JOSEPH BOWLES v. SAMUEL K. LYON.

Where one who has leased a house or room for a fixed period, continues in possession for a week after his lease has expired, without any opposition from the lessor, the lease will be presumed to have been continued at the same price and on the same conditions, but for no particular period, (C. C. 2659;) and under art. 2655 of the Civil Code, he will hold by the month, and can only be expelled after the fifteen days notice required by art. 2656, and can quit the premises only after giving a similar notice to the landlord. At any time within a week after the expiration of the lease, the tenant may be expelled without notice, or he may leave in like manner.

APPEAL from the Commercial Court of New Orleans, *Watts*, J. *Potts*, for the appellant, cited *Mossey v. Mead*, 2 La. 157. Civil Code, arts. 1811, 2656, 2658, 2659.

Peyton, and *I. W. Smith*, for the defendant.

MORPHY, J. This case presents a question relative to the law of landlord and tenant. The plaintiff, as lessee of Eliza Vance, sub-leased to the defendant the upper part of a house, for the term of nine months, from the 1st of February, 1840, at \$75 per month, and engaged to let him have the preference of the premises at the same rate of \$75 per month, during the time of his own lease, which was for three years, from the 1st of November, 1839. At the expiration of the nine months, the defendant held over during six other months—regu-

Bowles v. Lyon.

larly paid his rent up to that time, and left the property, after giving the plaintiff due notice of his intention to quit. The latter conceiving that the lease had been renewed for one year, by the defendant's continuing in possession after it had expired, had his furniture sequestered, and brought the present suit, in which he claims \$450 for the last six months' rent. The defendant admits that he did remain in the house after his lease had expired; thus enjoying the preference guaranteed to him of renting it by the month, but denies that there was any renewal of the lease for one year, or for any other specified time. He further avers, that should it be held that he is under any obligation resulting from said lease, he is entitled to have it rescinded, on the ground that the house is leaky and untenable, from the plaintiff's long neglect and refusal to make the necessary repairs. There was a judgment below for the defendant, from which the plaintiff has brought this appeal.

As the defendant never declared for what length of time he desired to avail himself of the clause securing to him a preference, and as no step was taken by either party to renew the lease for any fixed period, he continued in possession of the premises, in the same manner as he might have done, with the acquiescence of his lessor, had no such clause been inserted in his lease. The inquiry must then be, what is, under our Code, the effect of the continued possession of the tenant after the expiration of his lease; or, in other words, for what period does a tacit *reconduction* take place.

Article 5659 of the Civil Code provides that, "If the tenant of a house or room, should continue in possession for a week after his lease has expired, without any opposition being made thereto by the lessor, the lease shall be presumed to have been continued, and he cannot be compelled to give up the house or room, without having received the legal notice, or warning, directed by article 2656."

From this article, the French text of which is more explicit than the English, it is clear that when the tenant holds over at the end of his lease, without any opposition on the part of the lessor, although the lease is presumed to have been continued, it is not for any particular period, and that the lessee can quit the premises,

or the lessor recover possession of them, on giving the fifteen days notice required by article 2656. A tacit reconduction, or new lease, takes place for the same price, and on the same conditions as the former one, but for no particular time. Were it necessarily to be for one year, as is contended on the part of the plaintiff, or for the same period as the expired lease, neither of the parties could put an end to it, as is provided by article 2656, for those leases wherein no time for their duration has been agreed on.

In commenting on articles of the Napoleon Code analogous to ours, Troplong remarks: "*La tacite reconduction ne s'opère pas non plus nécessairement pour le même tems que l'ancien [bail.] C'est un bail sans écrit, dont la durée est déterminée par les usages sur le terme de ces sortes de baux.*" "*A part ces différences de tems, et la noncontinuation des cautions et hypothèques, la tacite reconduction est censée faite aux mêmes conditions que le bail précédent.*" Troplong, De Louage, Nos. 451, 452, and 612, 614, on article 1759.

But what in this article of the French Code is left to be regulated by usage, has been the subject of positive legislation in ours. Article 2655 provides, that "if the renting of a house or other edifice, or of an apartment, has been made without fixing its duration, the lease shall be considered to have been made by the month." When, therefore, the lease of a house for a given time expires, the landlord may, at any time within one week, expel the tenant, without giving him any notice, and the tenant in like manner may quit the premises without notice to the landlord; but if the latter suffer him to hold over for one week, then the tenant holds for one month under article 2655, at the previous rent, and can only be expelled by the fifteen days notice required by the following article of the Code; and he, on the other hand, can quit only on giving a similar notice to the landlord. Such appears to us to be the only effect of a tacit reconduction, under the articles of our Code. If this be so, the defendant had a right to quit the premises rented to him, on giving the plaintiff the notice required by law, and cannot be made liable for any rent subsequent to that time, as such notice put an end to the new lease resulting from his continued possession, and the acquiescence of his landlord.

We have been referred to the case of *Mossy v. Mead*, 2 La.

Grimshaw and another v. Hart and another.

157, as containing a different doctrine. The court went, perhaps, further that it was necessary, for the decision of that case. The question was, whether the plaintiff could recover a larger amount of rent than that stipulated in the expired lease, in consequence of a notice he had given the tenant that he would increase the rent, after having suffered him to hold over for several months. The court decided that he could not under the tacit reconduction, which was a renewed lease on the same terms, and this agrees with the decision in *Rodriguez v. Combes et al.*, 6 Mart. 275. The question as to the period for which a tacit reconduction takes place under the Code, was not directly before the court.

Judgment affirmed.

JAMES GRIMSHAW and another v. HENRY HART and another.

A defence that a memorandum of a contract of sale had been altered by the plaintiffs without the consent of the defendants, not made in the lower court, cannot be urged after appeal.

Defendants contracted to purchase a piece of land for a certain sum, payable part in cash, and the remainder at future periods, but refused to execute the contract on the ground that the property was encumbered with mortgages. Plaintiffs produced an act which had been prepared for the conveyance of the land to the defendants, containing a clause for the intervention of the mortgagees, and the release of their claims, on the payment of the cash price, and the delivery of the notes, for the future instalments according to the terms of the contract. The act was not signed by the mortgagees, but it was proved that they were ready to sign it, on the payment of the cash price and the delivery of the notes. In an action for a specific performance: *Held*, that the existence of the mortgages authorized the defendants to retain the price until the mortgages were released or security given, but did not absolve them from the obligation of completing the purchase; and that plaintiffs offered what was equal to a release of the mortgages, and better than any security which the court could order to be given—the intervention of the mortgagees in the act of sale, for the purpose of releasing their claims, on the compliance of the purchasers with the terms of the sale. Judgment for the plaintiffs.

APPEAL from the Commercial Court of New Orleans, *Watts, J. Paul, H. R. Denis*, and *Benjamin*, for the plaintiffs.
Roselius, for the appellants.

MARTIN, J. The facts of this case are these: the defendants
VOL. VI.

Grimshaw and another v. Hart and another.

made a written proposal to the plaintiffs, for the purchase of a piece of land of the latter, in the city of Lafayette, which was accepted in writing. The present suit was brought for a specific performance of the contract, and resisted on the plea of the general issue, and a denial of the plaintiffs' readiness or ability to give to the defendants a valid title, the land being encumbered with mortgages far exceeding its value. The defendants admitted their signatures to the proposal for the purchase. There was a judgment against them, and they appealed.

The statement of facts consists of the defendants' proposal to purchase the premises for a given sum, payable partly immediately, and partly at protracted periods. Under this proposal, the plaintiffs wrote the word *accepted*, and placed their signatures, under which is a statement of the manner in which the protracted payments were to be effected, to wit, by a number of notes, one-half of which were to be made by Hart, and endorsed by his co-defendant; the other half by the latter and endorsed by Hart. A notary produced an act which he had prepared for the conveyance of the land by the plaintiffs, to the defendants, which contained a clause for the intervention of all the mortgagees, and the release of all their rights, on the defendants' payment of the cash price, and the delivery of the notes for the protracted instalments, according to the terms of the contract. The act was not signed by the mortgagees, but they stated their readiness to sign it and release their mortgages, on the defendants' making the payment, and delivering the notes. McKinney, the defendants' attorney, called by the plaintiffs, deposed, that he had examined their title, and saw no objection thereto but the mortgages; and that his clients were ready to comply with the contract as soon as the mortgages were raised. A witness for the defendants stated, that he went frequently with the defendants to the notary's office, and that the defendants had the money for the cash payment, and the notes for the others, which they offered, and demanded an unencumbered title. He added, that he went with Hart to the office of Grimshaw, where the former told the latter, that he considered himself released from his contract, by the latter's neglect to have the mortgages released, and was answered, that he would be sued. The statement which is drawn by the counsel of the

Grimshaw and another v. Hart and another.

parties, concludes with an admission, that an act was prepared by the notary reciting the mortgages, in which was the clause stated by the notary for the intervention of the mortgagees, and the release of their mortgages on their receiving the price.

It appears to us, that the First Judge did not err. The counsel for the appellants has indeed urged in this court, that his clients made a joint proposal, on which the appellees could not engraft a joint and several obligation; nor did the former engage to give any note, either joint, or joint and several for the protracted payments. That their proposal was accepted absolutely, and the appellees have not a right to insert after their signatures to the acceptance, a statement of notes to be given by the appellants. The proposals, acceptance, and statement of notes, were read below without any opposition. If the statement of notes was, after the acceptance, and without the participation of the appellants, added to the acceptance, it was a forgery, and it ought not to have been read. The appellants made no such defence below. It is clear they expected that their notes would be required; for a witness introduced by them informs us, that they had prepared their notes, and were ready to deliver them if the mortgages had been raised. They must, therefore, be confined to the only defence they made below, to wit, that the mortgages were not released. The existence of the mortgages did not absolve them from the obligation of completing the purchase, otherwise than by authorizing them to retain the price until the mortgages were released, or security was given them. The vendors offered them what was equal to a release of the mortgage, and better than any security which the court might order to be given, to wit, the intervention of all the mortgagees in the act of sale, and their release therein, on the compliance of the vendees with the terms of the sale.

Judgment affirmed.

HENRY CASEAUX v. HIS CREDITORS

The privilege on the price of the property sold, where the price has not been paid by the purchaser, nor passed into an account current between him and the insolvent, granted to the consignor by art. 3215 of the Civil Code, in the event of the insolvency of the consignee, will not be affected by the fact that the property was sold with other property of the same kind, and one note taken for the price of both, where the bill of sale shows the price of each parcel, and the amount collected by the syndic can be apportioned accordingly.

Where in the settlement of the estate surrendered by an insolvent, the proceeds of the moveables are insufficient to pay the privileged charges, the property on which liens or mortgages exist, and not the creditors holding such liens and mortgages, must contribute to their payment.

The privilege of a vendor on the unpaid price of property sold by an agent who has made a *cessio bonorum*, is superior to that acquired by levying a *fi. fa.* on notes given for the price, in the hands of an attorney of the insolvent before his cessation. C. C. 3215. C. P. 722.

APPEAL from the Parish Court of New Orleans, *Maurian, J.*

MORPHY, J. This appeal is taken by John Slidell, from a judgment allowing a privilege claimed by Amédée Larrieu, a merchant of Bordeaux, on the proceeds of thirty half pipes of brandy, consigned to the insolvent for sale, in 1837. The record shows, that this brandy was sold, together with seventeen other half pipes, to Cazenove, Guieu & Co., in one bill of sale, the brandy of Larrieu for \$2885 62, and the remainder for \$1700 31, making an aggregate amount of \$4585 90, for which the purchasers gave their promissory note, payable at six months from the 2d of February, 1837; that, on the 5th of April following, this note was exchanged for three other notes of Cazenove, Guieu & Co., of 1528 64 each; that, in consequence of some unexplained arrangement between Caseaux and Charles Garnier, these three notes went into the hands of the latter; that, in September, of the same year, Cazenove, Guieu & Co., made some payments, renewed these notes by giving others, and, among them, four notes drawn by themselves, making together \$2522 38; that, after the death of Garnier, Caseaux claimed as his property, and recovered from the curator of Garnier's estate, these identical four notes given in renewal. Whether Garnier held these notes as agent or pledgee, does not appear from the evidence. While they were in the hands of W. C. Micon, as Caseaux's attorney, these notes

Caseaux v. His Creditors.

were levied upon by John Slidell, a judgment creditor of the latter. Caseaux having subsequently failed, Micou handed over to the syndic the four notes recovered of Garnier's estate, and a sum of \$1247 14 which he had received in part payment of them from the Improvement Bank, after retaining \$200 for his professional services. These facts sufficiently establish, we think, the identity of the money received by the syndic, with the proceeds of the brandy sold to Cazenove, Guieu & Co., and entitle the opponent to the privilege which article 3215 accords on the price of goods sold by a consignee or agent, when such price has not been paid by the purchaser. The circumstance of the opponent's brandy being sold together with another lot, should not affect or destroy his privilege, as the bill of sale shows the price of each parcel, which is included in the note or notes, and the amount collected by the syndic can be easily apportioned according to the amount of each sale.

From certain settlements and negotiations which appear to have passed between Garnier, and Cazenove, Guieu & Co. and the Improvement Bank, an attempt has been made to show that all the notes given in renewal to Garnier, have been paid and extinguished. An examination of these transactions, as they appear from the documents, does not bring us to such a conclusion. They, on the contrary, account for the manner in which the Improvement Bank held the \$1247 14, which they gave in part payment of the four remaining notes of Cazenove, Guieu & Co., which were held by Garnier. It appears that Cazenove, Guieu & Co., for the purpose of paying the Bank, and providing a fund to pay their notes in Garnier's hands, sold to that institution goods to the amount of \$8442 32; that, of this amount, \$2775 78 were placed to the credit of Garnier's succession, to be applied to the notes of Cazenove, Guieu & Co., and the balance, with a small deposit subsequently made by them, paid all their direct liabilities to the Improvement Bank, and a note of \$937 25 due to another person. If from the sum credited to Garnier's succession, which

was	-	-	-	-	-	\$2775 78
we deduct one of the notes of	-	-	-	-	-	1528 64
which appears to have been either discounted by, or	-	-	-	-	-	
pledged to the bank by Garnier, we find	-	-	-	-	-	\$1247 14

Caseaux v. His Creditors.

left in the Bank to be applied to the four remaining notes of Cazenove, Guieu & Co., held by Garnier; but these notes having been decreed to belong to Caseaux, the Bank paid to his counsel, Micou, this balance, which is the fund now in dispute between the parties.

It then remains to determine the amount coming to the opponent Larrieu, out of the money received by the syndic. The account of sales rendered to him by the insolvent, shows the nett proceeds to be \$1300 02. The Judge below allowed him \$294 50, that sum bearing to the money collected by the syndic the proportion which the debt of \$1300 02, due Larrieu for his brandy, bears to the whole proceeds of the two lots sold together. An examination of the documents shows two slight errors, which we have been called upon to correct. Larrieu's brandy was sold only for \$1 25 per gallon, instead of \$1 28, as mentioned in the account rendered to him by Caseaux, making a difference of \$71 06 in the nett proceeds. It appears also, that there were 80 gallons short in Larrieu's brandy, which at \$1 25 per gallon, makes another difference of \$100, for which Caseaux made an allowance in his settlement with the purchasers, but of which no mention is made in the account rendered to Larrieu. These two sums being deducted, reduce the nett proceeds to \$1128 35, which will make Larrieu's proportion amount only to \$257 58 of the money in the hands of the syndic. It has been finally urged, that Larrieu should, on this amount, contribute the per centage of thirty per cent, which the tableau shows is necessary to pay privileged expenses, after exhausting every fund not subject to any privilege. In *Janin v. His Creditors*, 10 La. 555, and in other cases, we have held that it is the property on which liens, or mortgages exist, which owes a contribution, in case the proceeds of the moveables are insufficient to meet the privileged charges, and not the creditors holding such liens or mortgages. 5 Mart. 468. 6 Mart. 519. The contribution, therefore, in this case must be made on the fund of \$1047 14, and out of the remaining balance, to wit, \$731 94, Larrieu, who holds a vendor's privilege, must be paid in preference to Slidell, who has only the privilege he has acquired under his seizure. Code of Practice, art. 722. Civil Code, art. 3215.

Frazier, and another, Receivers, &c. v. Vance.

It is, therefore, ordered that the judgment of the Parish Court be so amended as to allow the privileged claim of Larrieu only for \$257 58, instead of \$294 50, as his proportion of the proceeds of the brandy sold to Cazenove, Guieu & Co., in the hands of the syndic, and that it be affirmed in all other respects; the appellee paying the costs of this appeal.

Lockett and Micou, for the opponent, Larrieu.

Thomas Slidell, syndic, contra.

WILLIAM WEST FRAZIER and another, Receivers, &c. v. ELIZA VANCE.

Where no judgment was pronounced in the inferior court on the claim of an intervenor, his appeal will be dismissed.

THE defendant and an intervening party, appealed from a judgment of the Commercial Court of New Orleans, *Watts, J.*

MARTIN J. There are two appellants in this case; the first is the defendant; the other an intervening party, the Merchants Bank of Baltimore. The defendant was sued on a clause of a notarial act of sale, by which she assumed a debt of her vendor. Although a pertinacious defence was made for her in the first court, her counsel has not seen fit to oppose the affirmance of the judgment against her in this. The appeal of the intervening party is premature, as no judgment was given on his intervention in the Commercial Court. The plaintiffs' claim against the defendant appears to have been correctly sustained.

It is, therefore, ordered and decreed, that the judgment against the defendant be affirmed, with costs, and that the appeal of the intervening party be dismissed, with costs.

Peyton, I. W. Smith and *T. Slidell*, for the plaintiffs.

Josephs and *Wharton*, for the appellants.

The State v. The Judge of the Court of Probates of St. James.

THE STATE v. THE JUDGE OF THE COURT OF PROBATES OF
ST. JAMES.

A rule supported by affidavit, taken on a Judge of a Court of Probates, to show cause why a mandamus should not be issued to compel him to pronounce a judgment on a case which had been submitted for decision more than twelve months previously, will be made absolute where no cause is shown by the Judge.

ON the 14th of July, 1843, Joseph Henry Vanderlinden applied to the Supreme Court for a rule on *J. J. Roman*, Judge of the Court of Probates of St. James, commanding him to show cause, on the fourth Monday of November following, why a writ of mandamus should not be issued to compel him to pronounce a judgment in a suit instituted by Louis Huard, as tutor of Vanderlinden, then a minor, and others against Caroline Chapdu and others. The application alleged, that the case had been submitted, by the counsel on both sides, for decision, in the spring of 1842; and that no decision had yet been rendered, notwithstanding repeated applications to the Judge. The facts stated by Vanderlinden were supported by his affidavit.

MARTIN, J. In July last, the Judge of Probates of the Parish of St. James, was ordered to show cause on the first day of the November term, why a writ of mandamus should not issue, commanding him to give judgment on the petition of Joseph Henry Vanderlinden, &c. Our writ appears to have been served on the Judge on the 11th of August last, and he has shown no cause.

It is, therefore, ordered that the rule be made absolute.

Blache, for the applicant.

Liles v. The New Orleans Canal and Banking Company.

SARAH W. LILES v. THE NEW ORLEANS CANAL AND BANK-
ING COMPANY.

Damages can be assessed only by a jury; and in suits before the District Court of the First District, or the Parish, or Commercial Courts of New Orleans, the plaintiff must advance the compensation allowed to the jurors by the 17th sect. of the act of 10 February, 1841, where the defendant has not done so. C. P. 313.

In an action to recover a promissory note, or the amount for which it was made, with damages for its detention, the note was sequestered and delivered to the plaintiff on her giving bond to return it, in case it should be decreed to belong to the defendants. Judgment having been rendered in favor of the plaintiff for the note and damages, the defendants appealed from so much of the judgment only as related to the damages, and gave bond for a suspensive appeal in a sum fixed with reference to that part of the judgment. *Held*, that the acquiescence in the part of the judgment not appealed from, was not such a voluntary execution of the decree, as to prevent an appeal from so much of it as assessed damages.

APPEAL from the District Court of the First District, *Buchanan, J.* The plaintiffs sued to recover a note in the possession of the defendants, or its amount, with damages for its detention. The note was sequestered, and delivered to the plaintiff by the Sheriff, on his executing a bond, with security, to restore it in case it should be decreed to belong to the defendants, and to satisfy such judgment as might be rendered in the suit. Judgment was rendered by the court, without the intervention of a jury, ordering the note to be delivered to the plaintiff, or, in default thereof, condemning the defendants to pay its amount, with interest, and a sum of \$500 as damages. A suspensive appeal was allowed, on the defendants giving a bond in the sum of \$800. It was admitted that the note was in the possession of the plaintiff, and that the appeal was not taken from the part of the judgment relating to the note, but only from so much of it as awarded damages.

Chinn, for the plaintiff.

F. B. Conrad, for the appellants.

MARTIN, J. The defendants and appellants urge as a reason for the reversal of the judgment, an error apparent on the face of the record, to wit; that a judgment by default was confirmed, and damages given against them by the court, without

Millaudon v. Worsley and another.

the intervention of a jury. They rely on the 313th article of the Code of Practice, and 18 La. 474. The plaintiff and appellee admits that those authorities were conclusive before the late act of Assembly, which requires the party who wishes for a jury, to deposit the sum of twelve dollars. To this the opposite counsel has, in our opinion, victoriously replied, that the plaintiff was the party who had an interest in calling for a jury, for without it, the court could not legally give damages to her. She, therefore, ought to have made the deposit.

The plaintiff's counsel has further urged, that the defendants have voluntarily executed part of the judgment, and cannot appeal for the balance. The plaintiff claimed as her property, a note in the possession of the defendants. She had it sequestered, and it was finally delivered to her. She afterwards proceeded in her suit for the damages resulting from the improper detention of the note. They were, as we have seen, allowed her, and the defendants sought to be relieved by a partial appeal. This, in our opinion, is correct.

It is, therefore, ordered and decreed, that the judgment be annulled and reversed, so far as the confirmation of the judgment by default gives damages; and that the case be remanded for further proceedings according to law; the costs of the appeal to be borne by the plaintiff and appellee.

LAURENT MILLAUDON v. WILLIAM W. WORSLEY and another.

Plaintiff having sued his lessee levied a provisional seizure on goods belonging to defendants, sub-lessees. The seizure was released on the defendants endorsing a note drawn to their order by plaintiff's tenant, for the amount of the rent due to him by the latter. To an action on the note defendants pleaded error and want of consideration. *Per Curiam*. After having endorsed the note as a compromise, and prevented the plaintiff from testing his right to seize their goods, defendants cannot be allowed to urge that they owed nothing to the plaintiff or his lessee, and that they are not bound by their endorsement, because it was given to release an unlawful seizure, under the mistaken belief that their goods were liable for the rent due to the plaintiff. C. C. 3045.

Millaudon v. Worsley and another.

APPEAL from the City Court of New Orleans, *Collins, J. Benjamin*, for the plaintiff.

Mott, for the appellants.

MORPHY, J. The defendants have appealed from a judgment against them, as endorsers of a note, drawn to their order by T. Ogilvie Sully. The defence set up is error and want of consideration. The evidence shows, that in February, 1842, they rented a store in Poydras street from the drawer, Sully, who was then Millaudon's lessee, and who stood indebted to him for some previous rent; that, a few days after, under the erroneous impression that the row of buildings to which this store belonged, was not provided with fire walls, and that, in consequence thereof, they could not procure insurance on their goods in it, by reason of a late regulation of the insurance offices, the defendants began to remove their goods from the store, but were prevented from completing such removal by a seizure on them, laid by Millaudon, under process issued in a suit he had brought against his lessee, T. Ogilvie Sully. In order to obtain a release of this seizure, they agreed with the plaintiff to endorse the note sued on, which was given for the amount of rent due to the latter by the drawer. The desire of releasing their goods from Millaudon's seizure, was, in our opinion, a sufficient consideration for the endorsement on which the defendants are sued. They cannot be permitted to urge, as they now do, that they owed nothing, either to Sully, or Millaudon, and that they are not bound by their endorsement, because they gave it for the purpose of releasing an unlawful seizure, and under the mistaken belief that their goods were liable for the rent due by said Sully to the plaintiff. It is clear from their own showing, that they endorsed this note by way of compromise, and to put an end to the suit, or litigation which had arisen between them and Millaudon. After having, by this compromise, prevented the latter from testing his right of seizing their goods for the rent due to him, and obtained a release of his seizure, they cannot attack it on the score of any error in law, and absolve themselves from the obligations they have contracted. Civil Code, art. 3045.

Judgment affirmed.

VENDLING DOLL v. GASPARD THEURER.

Where an endorser, the wife of the maker of a note, could not sue the latter, her endorsee cannot.

A husband can contract with his wife only in the cases specially authorized by law.

APPEAL from the City Court of New Orleans, *Collins, J.*

Grivot, for the appellant.

Latour, for the defendant.

MARTIN, J. The defendant is sued by his wife's endorsee, on three notes which he gave her. He resisted the claim on several grounds, the examination of one of which will enable us to dispose of the case, to wit, that the endorsee cannot have any greater right than the endorser had; that the wife could not have maintained an action against him, and, therefore, could not convey any to the plaintiff. *Non dat qui non habet*. There are but few contracts which the husband can make with the wife. He may sell property to her in discharge of her rights, for property of hers, disposed of by him. It is not pretended that the notes were given for this purpose, nor on any other ground authorized by law.

Judgment affirmed.

PHILIPPE MARSOUDET, Syndic of the creditors of Pierre Henry Colsson v. A. J. V. JACOBS.

Objections on the ground of informality, illegality, or falsehood to the protest of a bill or note, and to the certificate of the notary as to the manner in which notice was served or forwarded, go to the effect, and not to the admissibility of the evidence. Such objections cannot authorize its exclusion. The notice and certificate are *prima facie* evidence; if proved to be informal, false, or illegal, the court or jury will disregard them.

Where a defendant offers in evidence the original of a notarial protest, for the purpose of showing, that in the part which relates to the demand and notice, it contains erasures and interlineations, and that the copy introduced by the plaintiff was not conformable to the original as to these matters, he cannot move the court to reject,

that part of the original which relates to the demand and notice. *Per Curiam*. The legal consequences of the want of demand and notice, is a question entirely different from that of the reception of evidence by which they are expected to be supported or disproved.

The statements of a notary, in the body of a protest, as to the demand of payment, and his certificate as to the manner of serving or forwarding notice, may be contradicted by parol. His statements and certificate are legal, but not conclusive evidence of what they contain. Act 13 March, 1827, sect. 1. Evidence to contradict them is admissible under a general denial of the allegations in the petition.

The mere erasure of one or more words in an act of protest, and the interlineation of others, will not annul the instrument. Notaries may, at the time, correct omissions or errors in such an act, by erasing words incorrectly used, and by interlining others; but they cannot, after the act is executed, alter or amend it in any respect. To annul an act on account of such interlineations or erasures, it must be proved that they were made after the act was executed.

By the commercial law it is not indispensably necessary that the demand of payment of a promissory note, or inland bill of exchange, should be made, and the notice of non-payment given by a notary. Any person competent to testify as a witness, may do so; but the mode of proof is different in the two cases. Under the act of 13 March, 1827, sect. 1, the certificate of the notary is evidence of the demand and notice of protest; but when the demand is made, or notice given by a private individual, it must be strictly proved by the person making it, or by other competent testimony.

The acts of 14 February, 1821, and 13 March, 1827, authorizing notaries, and others acting as such, to demand payment of notes, bills of exchange, or orders for the payment of money, and to give notice of the protests thereof, and making their statements in the protest and certificates evidence of all that is contained in them, gives this authority to their official acts as sworn officers, and on the assumption that their acts and statements are under the sanction of their official oaths. They are expected to act themselves in making demands and giving notices. The duty cannot be delegated to others. They can only certify what they do or have done themselves, or what they know to be true of their own knowledge. The acts of 1821 and 1827 introduced no new rule as to the demand of payment and notice of protest of bills and notes, but only another mode of proving them. What will constitute legal demand and notice, depends on the general commercial law.

A party cannot prove by parol, a demand of payment of the drawer of a bill made by a private individual, and a notice of protest by the notary's certificate. The certificate can only be evidence of notice, when the notary makes the demand himself.

APPEAL from the City Court of New Orleans, *Collins, J.*

GARLAND, J. The defendant is sued as the endorser of a promissory note, drawn by one Bernard Hart, given, as it is alleged and proved, to secure part of the price of a lot of ground in the city of New Orleans, sold by the plaintiff to Hart, on which the former retained a mortgage as additional security. It is al-

leged that payment of the note was demanded, and notice of non-payment given to the defendant. The petition concludes with a prayer for judgment against the defendant for \$625, with interest and costs, with a mortgage and vendor's privilege on the house and lot described. The answer admits the endorsement of the note, but denies all the other allegations, and all liability on account of said endorsement.

The plaintiff offered in evidence a copy of the act of sale from himself to Hart, the drawer of the note, to establish his claim to a mortgage, we suppose; also the note, and a protest in the ordinary form. The formal and usual words used in a protest are printed, and a blank was left for the date which was filled with the words "*seventh day of August.*" The word *seventh* was erased, and an asterisk placed at the end of it, referring to the word *fifth* written at the foot of the instrument, over the notary's and witnesses' names, to which is added: "This ref^{co}, app^{ed}; one word erased, null." In the body of the protest the notary states, that he is duly commissioned and sworn, and that he "proceeded to the late domicile of Mr. Bernard Hart, and there presenting said note to Mrs. Widow Hart, I demanded payment thereof, and was by her answered, that she had no funds to pay the said note, but that Mr. Greiner would settle the matter. I then proceeded to the office of Mr. Greiner, and there presenting him the same, I demanded payment thereof, and was by him answered, that said note was to be protested." The certificate of notice is in the usual form. The object of offering the original protest in evidence, it is stated, was to show the erasure and interlineations in it. The defendant then had the notary who made the protest, sworn as a witness, and asked him, whether he had ever demanded payment of the note sued on, as stated in his protest. He refused to answer the question. Armand Durel, who signs the protest as a witness, and is understood to be a clerk of the notary, states, that it was he who demanded payment of the note of Mrs. Hart, who referred him to Greiner. He then called on that gentleman with it, and demanded payment of him, who, after some conversation not necessary to be recapitulated, told him that the note might be protested. He says, that he knows that the notary did not in person make any demand of said note. Demoruelle, the other witness to

Marboudet, Syndic, v. Jacobs.

the protest, and a clerk of the notary, says, that he was in his office on the 5th of August, 1843, and that Durel demanded payment of the note. He knows that Boudousquie did not demand payment of it. Greiner says, that on the 5th of August, 1843, Armand Durel, one of the witnesses, demanded of him payment of the note. That the notary never did demand it of him at any time.

The inferior Judge in his judgment says, that it being shown that payment of the note was demanded at maturity, and notice of its protest given to the defendant, he, therefore, gives judgment for the plaintiff, from which judgment the defendant has appealed.

Our attention is first called to several bills of exceptions taken by both parties. The plaintiff first offered as evidence, a document purporting to be a copy of the protest of the note sued on, to establish a demand of payment of the drawer, and notice to the defendant. The defendant, by her counsel, objected to its reception, on the ground that it contained erasures and interlineations; that no day was mentioned therein, when demand of payment was made of the drawer; that it was illegal, informal, and not made according to law. The Judge said, that the interlineations appeared to be merely the usual memoranda made by the notary, of his corrections of the body of the act or copy, and that the erasures, being noted at the bottom over the signature of the notary, supplied and corrected the omission of the date, and that, therefore, he would admit the act as evidence. The defendant excepted. We do not think the Judge erred. The objections all go to the effect of the evidence, and not to its admissibility. The law makes the protests and certificates of notaries, at least *prima facie* evidence of demand and notice; if they are informal, illegal, or false, it is not a cause for excluding them from the court or jury, but a reason for declining to give them effect, when the illegality or incorrectness of the act is established by proper testimony.

The defendant then offered as evidence the original of the notarial protest, for the purpose of showing that it contained erasures, and interlineations, and that the copy was not conformable to said original, in relation to these matters. He also moved the court to disregard the copy, and all that part of the original which goes to establish a demand of payment, because of the erasures and inter-

lineations, and the informality and illegality of the act. The Judge admitted the document in evidence, for nearly or exactly the reasons before stated, and refused to disregard what was erased or interlined, because it was explained at the foot of the protest, before signature. In this decision, the Judge did not err. The defendant cannot complain, that the Judge admitted the document offered by her counsel, for the purpose mentioned; and she had no right to call upon the court to reject and disregard all that related to demand and notice. The sufficiency of those is the question to be decided, and if the Judge had said the protest was a nullity, there would have been an end of the controversy. The legal consequences of a want of demand and notice, is a question entirely different from the reception of the evidence, by which they are expected to be supported or defeated.

The defendant then offered parol proof to contradict the copy of the act offered by the plaintiff. To this the latter objected, as it would contradict the original act offered by the said defendant in evidence; and further, because the law, having made the copy of protest and certificate of notice evidence of both demand and notice, the protest could not be contradicted by parol evidence; more particularly, as the statements made in the body of the protest and certificate are not specially denied in the answer. The court overruled the objections, and the plaintiff excepted. We think the Judge did not err. The statements made by the notary in the body of his protest as to the demand, and the certificate of notice, may, in our opinion, be contradicted and shown to be untrue. The law makes his statement and certificate legal evidence of what is stated, but it is not conclusive and final. Like all other evidence, it may be contradicted and shown to be erroneous, upon proper allegations in the answer, which seem in this case to be sufficient to authorize the reception of the evidence.

On the merits of this case, the defendant relies upon two grounds to defeat the plaintiff's action.

1st. That the erasures and interlineations in the act of protest make it a nullity, and that the latter were made sometime subsequent to the date of the instrument.

2d. That the statement in the body of the protest, that the demand made of the drawer of the note, or, at his legal domicil, of

another person, *by the notary*, is not true; and that no legal demand of payment was ever made of the maker previous to the protest.

Upon the first point, we are of opinion, that the mere erasure of one or more words in the act of protest used incorrectly, and the substitution of others which are correct, does not of itself make the instrument a nullity. Notaries are as liable to commit mistakes in drawing up protests, as they are in preparing other acts, and the same consequences result from them. They have a right to correct their omissions or errors, and may, at the time, erase a word improperly used, and insert the correct one, by interlining it; but they have no right, after an act is made, to alter or amend it in any respect. In this case, it is not shown that the erasures and interlineations were made subsequent to the protest; and they, therefore, do not annul it. The evidence makes it certain, that the using the word *seventh* was an error, and that the erasure of it and the insertion of the word *fifth*, made the instrument conform to the truth. The demand of payment made by Durel, is shown to have been on the fifth of August, 1843.

The second point is, in our opinion, fatal to the demand of the plaintiff. By the commercial law, the holder of a promissory note or inland bill of exchange, may send any one competent to testify as a witness, to make a demand of payment, and, in case of the neglect or refusal of the drawer to pay, the holder may himself notify the endorsers by a written notice, sent through the post office, or in any other legal mode. In such a case, it is always necessary to produce in court, on the trial, the testimony of the person who made the demand, and gave the notice, or deposited the letter in the post office, to prove the time, place, and manner of making the demand and giving the notice. In the case of *Harri-son v. Bowen*, 16 La. 286, this court said: "It is not indispensably necessary that a demand of payment of a note should be made, and notice given by a notary public. Any other person may make such demand and give such notice, but the mode of proof is different. By our law, the certificate of a notary is evidence of demand and notice of protest; but when such demand is made and notice given by a private individual, it must be strictly proved by the person making it, or by other competent testi-

mony." In 6 La. 730, this court, also held, that the act of 1827 relating to the protest of notes by notaries public, "has not introduced any new rule as to the demand of the makers of promissory notes, or acceptors or drawees of bills of exchange. What will constitute a legal demand of payment, so as to bind endorsers, must depend on the commercial law, independently of the act of 1827. Chitty on Bills, 337, and notes."

The Legislature, for the purpose of introducing more certainty and uniformity, in the mode of making demands and giving notices of protest; for making the proof of them more convenient; and for the purpose of making interest run on notes and bills from the date of protest, and for other purposes, passed various acts *authorizing* Notaries Public, Parish Judges, and in some cases, Justices of the Peace, to make demands, and give notices of the dishonor of notes and bills of exchange, and making their certificates and statements admissible as evidence in courts of justice, of what is stated in them. B. & C.'s Dig. 41, 42, 43. The law gives this authority, and reposes this confidence in the official acts of these persons, because they are sworn officers, and upon the assumption that all their acts and statements, will be made and given under the sanction of, and in reference to their oath of office, and, therefore, dispenses with the personal presence of the officer to testify to his acts. The act of 1827 says, that Notaries shall, in their protests, make mention of the demand made upon the drawer, &c., "and of the manner and circumstances of such demand," and also the manner of giving notice. A high confidence is reposed in the officer, and a power given to him, which if not legally and prudently exercised, may produce the most serious results. The law expects and requires Notaries Public to act themselves, in making demands and giving notices. It is a duty they cannot delegate to others. In the case of *Duralde v. Guidry, &c.*, 5 Mart. N. S. 66, it is said, that "the act of the Legislature already referred to, has made no change in relation to the necessity of establishing these facts, which were always necessary to be shown, in order to bring notice home to the endorser. It has only introduced another manner of proving them. No higher credit can be given to a certificate, than would have been given to the oath of the Notary, had he testified to the same facts in open court. Proof made in the

latter mode, that he sent an express, would not be evidence that this express reached the endorser. We do not see how a Notary could swear or can testify, that a notice of protest was duly served, unless he did so himself, or put it in the post office. When he employs the agency of another, neither his oath nor his certificate of what that agent did, is the best evidence of which the case is susceptible. The statute, by requiring the officer to state the manner in which these notices are served or forwarded, negatives the idea that his certificate is conclusive. It conveys, on the contrary, a clear intimation that the court is to judge whether, in the manner used, the endorser could be considered as having knowledge of the fact. Any other construction would leave these expressions without meaning, or motive. Under this act of the Legislature, the endorser is affected by testimony which he has no power to cross-examine. The *ex parte* proof should be, therefore, clear, and in strict pursuance of the law under which it is taken. It is conferring power enough on Notaries, to enable them to bind their fellow citizens by certificates of what they do themselves. It would be monstrous to permit them to certify to the truth of facts, which they can only know from the relation of others." This reasoning, it appears to us, is conclusive.

In the case before us, the Notary in positive terms states in his protest and certificate, that he made the demand, and gave notice of protest. When called on to say on oath, whether these statements are true, he refuses to answer. In other words, he refuses to sustain, as a witness in court, what, as a sworn officer, he had stated in an official act to be true. This the law does not, and will not sanction. Notaries are only permitted to certify what they do themselves, and what they, of their own knowledge, know to be true. They cannot, by adopting the acts and sayings of others, make them evidence against others. The defendant has most clearly shown, that the Notary never made any demand of payment of the note as stated in the certificate; and that that shown to have been made by his clerk, is insufficient.

The plaintiff contends, that although the certificate of the Notary may be insufficient, yet as it is proved by Durel that he made a demand of payment, he comes within the case in 16 La 286. So far as to the demand, this may be true, but the witness

Guimbillot v. Abat.

does not prove any notice to the defendant, of a refusal to pay by the drawer, or the agent named. The certificate of the Notary is the only evidence of notice, and the insufficiency of that has been shown. The plaintiff cannot be permitted to prove by parol, a demand of payment of the drawer, and a notice of protest by the Notary's certificate. That certificate can only be evidence of notice when the Notary makes the demand.

The judgment of the City Court is, therefore, annulled and reversed, and ours is for the defendant as in case of nonsuit; with the costs in both courts.*

Marsoudet, plaintiff, pro se.

Greiner, for the appellant.

JEAN GUIMBILLOT v. JOSEPH ABAT.

It is well settled that the ratification of a principal will be inferred from his silence, if, when apprized of an act done by his agent without, or beyond his authority, he does not, within a reasonable time, express his dissent; but no such inference will be drawn, where the act was not done in the name of the principal, nor apparently for his benefit, and the circumstances of the case sufficiently account for the silence of the principal without construing it as an acquiescence in the act.

Where a third person attempts to establish the ratification of an unauthorized act of an agent, from the silence, or conduct of the principal, it must clearly appear that he has been misled thereby, or induced to forego some advantage he would otherwise have enjoyed.

APPEAL from the Parish Court of New Orleans, *Maurian*, J.
Barthe and *Benjamin*, for the plaintiff.

D. Seghers and *Eustis*, for the appellant.

* By an act of 14 March, 1844, subsequent to the date of this decision, it is declared: "That it shall be lawful for each and every Notary Public in the city of New Orleans, to appoint one or more deputies to assist him in the making of protests, and delivery of notices of protests of bills of exchange and promissory notes: *Provided*, that each Notary shall be personally responsible for the acts of each deputy employed by him; and *provided*, that each deputy shall take an oath faithfully to perform his duties as such, before the Judge of the parish in which he may be appointed; and *provided*, the certificate of notice of protest shall state by whom made or served."

Guimbillot v. Abat.

MORPHY, J. The material facts in relation to this controversy are the following. In March, 1840, the plaintiff, having borrowed fifty thousand francs from Maurice Abat in France, agreed to give him in pledge, and to place in the hands of Joseph Abat, his brother, at New Orleans, a note of \$21,800, drawn by Joseph Girod, to the order of, and endorsed by Nicolas Girod, which note was the property of the plaintiff, and had been left by him in the hands of P. J. Tricou, his agent in this city. In execution of this agreement, the plaintiff directed his agent here to deliver the note to the defendant; but it had already been pledged to the latter by P. J. Tricou, to secure a personal debt of his own, amounting to \$6900, as appears by a receipt, or acknowledgment, executed by Joseph Abat, under private signature, on the 24th of January, 1840. The plaintiff now seeks to recover the note in question, on paying to Maurice Abat, the debt for which it has been pledged to the latter; while, on the other hand, the defendant claims to be paid out of the proceeds of the note the \$6900 lent to Tricou. By agreement between the parties, the note was deposited in the hands of Maurice Abat, who, when he returned to France, left it with L. Garnier, his agent here, to remain subject to the rights of all the parties. There was a judgment below in favor of the plaintiff; and the defendant has appealed.

The evidence shows, and it has not been denied, that the note for \$21,800, is the property of Guimbillot, and that the defendant was aware of the fact when he received it from Tricou, who, moreover, endorsed it as the plaintiff's agent. It further appears from the procuration, that Tricou had the power of endorsing in the name of Guimbillot only to a certain extent, in certain banks, and in favor of certain persons; that he had no power or authority to borrow money, or to pledge notes in the name of Guimbillot, and still less to pledge notes belonging to the latter, to secure his (Tricou's) personal debts. The defendant was then fully aware that Tricou had no right to appropriate this note to his own use, and that, therefore, the pretended pledge could give him no rights whatever. But it has been most strenuously contended that, admitting this to be so, yet, as the plaintiff did not immediately express his dissent, when apprized of the pledge made of this note by his agent, he must in law be held to have ratified it.

Nothing is better settled than the doctrine, that the ratification of a principal will be inferred from his silence, if, when apprized of an act done by his agent without his authority, or beyond his authority, he does not, within a reasonable time, express his dissent. But while we readily admit the soundness of the doctrine contended for, we hold it to be altogether inapplicable to the circumstances of this case. The pledge in question was not made in the name of Guimbillot, nor apparently for his advantage, but in the name and for the avowed benefit of his agent; and the plaintiff was directly apprized of the transaction, neither by Tricou, nor by the defendant. The only notice or information in relation to it, which the plaintiff ever received, reached him through a correspondence between the defendant and Maurice Abat, which was communicated to him by the latter. On the 15th of March, 1840, Maurice Abat wrote to the defendant, informing him of his loan of fifty thousand francs to the plaintiff, on the note of Joseph Girod, which was to be placed in defendant's hands as a pledge for such loan, and requesting him to call on Tricou for the note, in case it had not already been handed to him, pursuant to the plaintiffs' instructions. On the 26th of September following, Maurice Abat writes to the plaintiff then in Paris, and tells him that he has just received from his brother, Joseph Abat, a letter bearing date the fifth of August, and of which he gives an extract touching his note of \$21,800, in the following words, to wit:

"Mon Cher Frère:—J'ai reçu dans le tems ta lettre, avec copie de celle de Guimbillot. Je fis part à Tricou de ses dispositions, et il s'empresse de répondre qu'il m'avait remis le billet en question. La vérité est, que le billet de \$21,800, se trouve engagé entre mes mains pour une somme de \$6,900, ce qui laisse de la marge pour les 50,000 francs que tu as prêtés. Je dois te dire de plus, qu'il m'a promis de payer cette dernière somme sur la première vente qu'il fera. Il lui tient à cœur, à ce qu'il paraît, de dégager ce dépôt. J'ai attendu quelque tems pour te répondre, Tricou m'ayant fait espérer de libérer cette affaire. Je ne pense pas que tu aies le moindre risque à courir.

"Comme Guimbillot pourrait être inquiet, je pense que les renseignemens que je te donne sont plus que rassurants."

Maurice Abat concludes his letter by saying:—"D'après la

lettre de mon frère, Tricou lui paiera sous peu les \$6,900, et alors votre billet sera entre les mains de mon frère comme nous en sommes convenus. Soyez tranquille. J'aurai le soin d'écrire à Joseph pour que cette affaire se termine à votre convenance."

This letter of the defendant communicated to Guimbillot through Maurice Abat, whom he had made his agent for such communication, coupled with Maurice Abat's promise to write to his brother, so that the business might be arranged to his satisfaction, (*à votre convenance*,) sufficiently accounts for the silence of Guimbillot. Living in a foreign country, he seems to have relied on the assurances given him by both brothers, that he might be easy, and that Tricou would pay his debt. Hearing nothing more about the matter, he naturally supposed every thing settled as he was promised that it should be; and it would be most unjust and unreasonable to construe his silence into an acquiescence in, or approval of the unauthorized conduct of Tricou. He returned to this country with Maurice Abat, in November, 1842, and brought the present suit in December following. Some stress has been laid on a declaration made by the plaintiff, in a conversation with Maurice Abat, after his return, that he would have to lose his money. It may betray his ignorance of his rights, or his fear of incurring a loss, but by no means implies any ratification of the tortious act of his agent. When the ratification of an unauthorized act of an agent, is sought to be inferred from the silence, or conduct of his principal, in favor of a third person, it must clearly appear that the latter might have been thereby misled, and induced to forego some advantage he would otherwise have enjoyed. In the present case, the defendant knew of, and participated in Tricou's illegal act of conversion. Far from being misled by the plaintiff, he induced the latter to expect that he would get Tricou to refund the money lent to him. Instead of attempting to do so, he went on renewing the notes of Tricou, from time to time, until they were finally protested, in August, 1842.

Judgment affirmed.

Murphy v. Thielen, Sheriff, and others.

WILLIAM E. MURPHY v. JOHN THIELEN, Sheriff, and others.

A seizure under a *fi. fa.*, "of any money," which the party in whose hands the seizure was made, "has now or may hereafter have in virtue of his office of judicial sequestrator," will not, as against other creditors of the debtor whose property was sequestered, embrace any funds not, at the time, in the hands of the sequestrator. *Per Curiam.* A sum of money which may or may not be received, without any specification of amount, even by conjecture or approximation, is a thing too vague to form the object of a seizure.

APPEAL from the District Court of the First District, *Buchanan, J.*

BULLARD, J. Murphy being subrogated to the rights and actions of Parish, a judgment creditor of C. F. Hozey, took a rule upon the Sheriff of the District Court of the First District, upon F. Buisson, who had been appointed by the Commercial Court a judicial sequestrator, and upon the Branch Bank of Alabama at Mobile, another judgment creditor of Hozey, to show cause, why a sum of about \$571, admitted to be in the hands of Thielen, the Sheriff, who had been made garnishee in the case, should not be paid over to him, in discharge of his judgment against Hozey. The District Court having discharged the rule, on the ground, that the Branch Bank of Alabama had made a previous seizure of the fund, Murphy appealed.

The seizure to which the court thus gave effect, appears to have been made originally in the hands of Buisson, as judicial sequestrator. The levy was made on the 12th of April, 1841, and the Sheriff's return shows that he seized, in the hands of Buisson the judicial sequestrator, all the property or effects of Hozey in his possession or control, to an amount sufficient to satisfy the writ, "and particularly any money, he might now or hereafter have in virtue of his office as judicial sequestrator," &c.

We are of opinion, that this seizure did not embrace any fund not at that time in the hands of Buisson. A sum of money which may or may not be received, without any specification of amount, even by conjecture or approximation, is a thing too vague to form the object of a seizure under execution. It cannot be

The City Bank of New Orleans v. Barbarin and others.

identified, nor when sold, handed over to the purchaser by the Sheriff. Not only the fund in the hands of Thielen, afterwards levied on by Murphy, never was in the possession of Buisson, but it appears to have been collected afterwards by that officer, who, it is true, carried it to the credit of the judicial sequestrator on his books, but did not pay it over, it having, in the meantime, been seized in his hands by the present appellant. Now, although it may be true, as assumed by our learned brother of the District Court, that the appointment of Buisson still subsisting, authorizing him to collect all the official dues of Hozey, the late Sheriff, Thielen, would have been authorized to pay over such sums as may have been afterwards collected by him, it does not follow, we think, that a specific amount thus collected, is embraced in the vague description of the original seizure, so far as other creditors of Hozey are concerned.

We are of opinion, that the court erred in not decreeing the fund to belong to Murphy, the appellant.

The judgment of the District Court is, therefore, avoided and reversed; and it is further ordered and decreed that the rule be made absolute, and that the defendant, Thielen, pay over to the plaintiff \$334 37, the amount in his hands at the time of Murphy's seizure, and that the costs of both courts be paid by the appellees, the Branch Bank of Alabama.

Budd and Rousseau, for the appellant.

Thielen and Buisson, pro se. *Chinn*, for the other defendants.

THE CITY BANK OF NEW ORLEANS v. LOUIS A. BARBARIN
and others.

Under the provisions of the act of 5 February, 1842, reviving the charters of the Banks in the city of New Orleans, only the debts due to those institutions at the time of the passage of that act, can be considered as forming a part of their "*dead weight*." Debts subsequently contracted, though between the date of the passage of the act, and its promulgation, or acceptance by the Banks, are not included in the "*dead weight*."

The City Bank of New Orleans v. Barbarin and others.

APPEAL from the Commercial Court of New Orleans, *Watts, J. Lockett and Micou*, for the plaintiffs.

Grivot and Roselius, for the appellants. The defendants are entitled to the benefit of the provision of the act of 5 Feb., 1842, relative to the "*dead weight*." Their debts became the property of the City Bank on the 26 February, 1842, and the act of 1842 was not accepted by the Bank, until the 16 April following. The act of 5 February, is not proved to have been promulgated before the Bank became the owners of the notes sued on. It was not a law until promulgated.

SIMON, J. The defendants are appellants from a judgment which condemns them to pay, *in solido*, the sum of \$3340, with interest, being the amount of two promissory notes, regularly protested at maturity.

The defence set up is based upon their alleged right to the benefit of the *dead weight*, as allowed by the third section of an act of the Legislature, approved on the 5th of February, 1842, (Laws of 1842, p. 42,) and upon their right to renew the notes sued on, on their complying with the requisites of said law. They allege that said notes form a part of a series of notes given by them at a sale made by the Commissioners of the United States, of property in this city; that said notes were in the Citizens' Bank, at the time of the passage of the bank law; that they were transferred to the City Bank after the 7th of March, 1842; and that they remained there until the latter Bank was forced to stop paying specie, in June, 1842, when they were handed over to some pretended holder of the notes, who either had them discounted, or placed for collection in the Bank of Louisiana for the use of the City Bank.

The evidence shows, in substance, that the notes sued on were, with many others resulting from the sale of lots between Canal and Common streets, deposited in the Citizens' Bank, to await the decision of the courts, whether the same belonged to the Second or to the First Municipality of New Orleans; that they never were discounted in the Citizens' Bank; that after the determination of the suit, said notes, together with other notes, and the sums which had been collected thereon, were handed over to the Second Municipality; that the notes sued on were not the property of the

Citizens' Bank, and were received by the Treasurer of the Second Municipality on the 24th of February, 1842; and that, on the 26th of the same month, the same were discounted by the City Bank, and the proceeds thereof passed to the credit of the said Second Municipality.

The law of the 5th of February, 1842, relied on by the defendants' counsel, as entitling them to the privilege of the dead weight, appears to have been passed in reference to the situation of the affairs of the several banks of the State, and to the debts which were due to them, *at the time that it was adopted*. The third section of that act says, in positive terms, that "with a view of enabling the banks effectually to *secure their debts*, it shall be lawful for their respective boards of directors to consider *the whole of the debts due them on the passage of this act*, as forming part of their *dead weight*." There is no provision in the law referred to, allowing the benefit of the dead weight to the debts which were to be contracted towards the banks subsequent to the passage of the law, and it is clear that, if the notes sued on were not the property of any of the banks at the time that the law relied on was passed, the defendants cannot succeed. Now, it is true the notes sued on were deposited in the Citizens' Bank, at the time of the passage of the bank law; but they were not the property of the said Bank; they were withdrawn from it, and handed over to the Treasurer of the Second Municipality; and it was not until the 26th of February, 1842, posterior to the passage of the law, that said notes were discounted in the City Bank.

It has been urged, that a law does not take effect from its passage, or its approval by the Governor, but from the date of its promulgation, and that it was the duty of the plaintiffs to show that it was promulgated before the day on which the notes were discounted. It was further contended, that, at all events, said plaintiffs were bound to receive the application for the benefit of the dead weight, even if the law had been promulgated immediately after its approval, as the Bank was not bound by it until they accepted it; and as the debt became the property of the plaintiffs prior to the date of acceptance. These propositions cannot, in our opinion, be applied to the question under consideration. Neither the time of the promulgation of a law, passed for a specific object and

Deslix v. Jone.

in reference thereto, nor the period at which it is accepted by the persons upon whose rights it is to operate, can in any manner change, alter, destroy, or extend the special purposes for which it was adopted, and the object which the Legislature had in view at the very time that it was passed. The object of this law was not only to regulate, but also to secure the debts due to the banks in reference to the state of their affairs as then exhibited to the Legislature, and according to the statements, which we may well suppose, were then under the eyes or inspection of the law-maker. For that purpose a "*dead weight*" was created, in which were to be included the whole of the debts then due to the banks, or, as the law says: *the debts due them on the passage of the act*, and in the French text, "*toutes les créances qui leur sont dues au moment de la passation de cet acte*;" and we are not ready to say that any debts subsequently contracted, were at all in the contemplation of the Legislature when the law was passed, so as to permit the benefit of this law to be extended to debts which were not then in existence. If such had been the intention of the law-maker, it would have been so expressed; but as the law stands, the benefit of the dead weight must be limited to the debts due to the banks, *at the time of the passage of the act*, and cannot include those which were contracted afterwards, and not even those which were contracted between the date of the adoption of the law, and that of its promulgation, or acceptance by the banks.

Judgment affirmed.

PIERRE JEAN ALEXANDRE DESLIX v. CLEOPHÉE JONC.

Where a wife is a public merchant, carrying on a separate trade, she is in no way under the control of her husband so far as her trade is concerned, and needs no authorization from him to do any act in relation to it. C. C. 128. And where she occupies as a sub-tenant part of a building leased by the husband, the owner of the building will acquire, by operation of law, on her separate property contained in the shop occupied by her, a right of pledge for the payment of his rent, to the full extent of her debt to the principal lessee. C. C. 2675, 2676, 2677.

APPEAL from the District Court of the First District, Buchanan, J.

Deslix, appellant, *pro se*.

Labarre, for the appellee Caffin.

MORPHY, J. The plaintiff having obtained a judgment in this case, took out an execution, under which he caused to be seized, as belonging to the defendant, a sum of \$2094 99, in the hands of Charles Caffin. He then propounded interrogatories to the latter in conformity with the act of 1839. From the answers to those interrogatories, and the evidence adduced below, it appears that Pierre Jonc, the husband of the defendant, had leased from Caffin, for a considerable period of time, a large house forming the corner of Chartres and Custom-House streets, at the rate of \$416 66 $\frac{2}{3}$ per month; that the defendant, who was separated in property from her husband, was a public merchant, and carried on, in her own name, a separate trade, occupied as a store the lower part of the house, and moved into it the goods and merchandize constituting her stock in trade; that on, or about the 1st of February, 1842, Charles Caffin finding the doors of the store closed, and the premises abandoned, took out a provisional seizure, and had the goods and merchandize belonging to the defendant, sold for the rent due and to become due. The sale produced the sum of \$2094 99, out of which, after deducting some legal charges, Caffin received \$1952 87. Under these facts, the plaintiff called upon the garnishee, to show cause why he should not be decreed to pay him the amount of his judgment, with interest and costs, out of the money thus received, in payment of his rent. There was a judgment below in favor of the garnishee, from which the plaintiff has appealed.

It is contended, on the part of the appellant, that article 2677, of the Civil Code, which gives to the lessee a right of pledge on the effects of under-lessees, and even of third persons, when the goods of the latter are in the house or store leased by their consent, express or implied, is inapplicable to the present case. The idea presented is, that, as under article 1784 of the Civil Code, no contract can take place between the husband and the wife, and she is prohibited by article 2412, from binding herself or her property for the debts of her husband, the defendant could not

be viewed, either as a lessee of her husband, or as a third person by whose consent the goods were placed in the store ; but that she should be considered as being under the control of her husband, and as having obeyed his orders when she removed her goods into the conjugal domicil, or house rented and occupied by him, where she could more conveniently attend to her trade, and at the same time to her household and children ; that, therefore, her separate property has been wrongfully made liable for rent due by her husband ; and that, as she would have a legal right to recover back from Caffin its proceeds, the plaintiff, as her creditor, can legally seize and exercise such right.

Admitting that the plaintiff can have and exercise, in his own right, the action which he contends the defendant, his debtor, would have, to recover back, as her own, the money received by Caffin from the sale of her goods, (which may well be doubted,) the grounds upon which he rests her claim are wholly untenable. The defendant being a public merchant, carrying on a separate trade, was in no way under the control of her husband so far as her trade was concerned, and she needed no authorization from him to do any act in relation to it, Civil Code, art. 128. For whatever appertained to her trade, she was a third person as to the lessor, who acquired on her separate property a right of pledge for the payment of his rent, the very moment she brought it into his house. This right cannot be affected by the circumstance of her husband being the lessee principally or directly bound for the rent. We cannot consider her as having acted under marital constraint, when, by law, she was authorized to act without his consent, and in the manner she thought most conducive to her interest. The place where she determined to keep her store was, perhaps, the very best she could have selected for her business, and when she removed her goods into the store, she was perfectly aware of the right which, under the law, the owner of the house would acquire on them for the payment of his rent. Her property became liable by operation of law, and not by virtue of any conventional obligation entered into by her jointly with, or as security for Pierre Jone, her husband. Article 2412, so much relied on was intended as a protection to married women, and not as a cloak under which they, and their husbands might

The State v. Grant

enrich themselves at the expense of their neighbors. It would be convenient indeed, for married women separated in estate from their husbands, to have the leases of the stores they occupy, executed in the names of their husbands, carry on their business in them, and obtain exemption from the payment of any rent on the ground relied on by the appellant. But it has been insisted that at all events, the goods of Madame Jonc should have been made liable only for the rent of the store and back rooms in which they were deposited, and which Caffin himself admits, under oath, were worth only \$225 per month, to be computed only from the first of December, 1841. the whole rent having been paid up to that time. The goods found by a lessor on his premises are liable to his pledge for the rent due for the whole property, in whatever part of it they may happen to be stored, unless such goods belong to an under-lessee, in which case they are affected only so far as he is indebted to the principal tenant or lessee. Civil Code, arts. 2675, 2676, 2677. It is not pretended, in the present case, that the defendant was, or could, have become the lessee of her husband Pierre Jonc; but, even if the store could be separated from the rest of the premises, its rent at \$225 per month, up to the end of the lease, which Caffin had a right to claim, would far exceed the amount he received. *Christy v. Cazenove*, 2 Mart. N. S. 451.

Judgment affirmed.

THE STATE V. JOSEPH GRANT.

The 19th section of the act of 25 March, 1828, amending the Civil Code and Code of Practice, which grants an appeal in any case in which it is contended that the right of imposing a tax is contrary to the constitution or to the laws of the state, whatever may be the amount of the tax, refers only to claims for taxes sued for originally before a Justice of the Peace, or an Associate Judge of the City Court of New Orleans; and where the amount claimed is under three hundred dollars the Parish Court in the Parish of Orleans, and the District Court, in the other Parishes of the State, are the highest courts to which such an appeal can be taken. Though such a claim were sued for originally in the Commercial Court, no appeal can be taken to the Supreme Court.

APPEAL from the Commercial Court of New Orleans, *Watts, J. Preston*, Attorney General, for the State.

Emerson, for the appellant.

MARTIN, J. The defendant is appellant from a judgment on a claim of the State, for the sum of two hundred and fifty dollars, under the 9th section of an Act of Assembly "to increase the revenue of the State," approved March 26th, 1842, p. 440. The Attorney General has asked the dismissal of the appeal, on the ground that the amount in controversy, is under the lowest sum to which the constitution has limited the right of appeal to this court.

It has been urged, that the act of 1828 provides for an appeal on all claims of the State for taxes. Laws of 1828, p. 158. It appears to us that it does so, in cases in which "it is contended that the right of imposing a tax is contrary to the constitution or laws;" and the answer places the defendant's case within the law. It is also true, that the act provides that the appeal in matters of taxation, shall be had "whatever may be the amount of the tax;" but the question is not whether the appeal lies, but whether it does to this court. The constitution excludes it; and the act expressly states the courts to which it may be brought. The highest of these courts is that of the District, in the Country; and in the Parish of Orleans, the District Court seems to be excluded. The act refers only to claims for taxes sought to be originally enforced before a Justice of the Peace, or an Associate Judge of the City Court of New Orleans. Hence the counsel has concluded that, as the present suit was brought in the Commercial Court, no appeal lies except to this court; and as, in matters of taxation the smallness of the amount claimed does not prevent the appeal, there is no ground for the dismissal claimed by the Attorney General. The Commercial Court did not exist when the act under consideration was passed, and the District and Parish Courts are stated therein simply as courts *a quibus* and not as courts *ad quos*. It is clear that this act was passed without any reference to this court. An appeal thereto could only be pretended, upon a very forced implication. Had the Legislature given it in express terms, the constitutionality of the measure might well be questioned; and, admitting, that in such a case, we could overcome our reluctance

Cosnier v. Golding.

to declare an act of Assembly unconstitutional, nothing authorizes us to inquire whether the Legislature may extend our jurisdiction to cases under three hundred dollars, for it has not attempted to do so.

Appeal dismissed.

FRANÇOIS MICHEL COSNIER v. DANIEL GOLDING.

The master of a vessel is answerable for the baggage and effects of a passenger delivered to him, and not restored, nor accounted for.

APPEAL from the Parish Court of New Orleans, *Maurian, J. Barthe*, for the plaintiff.

Culbertson and Schmidt, for the appellant.

MORPHY, J. This action is brought to recover \$890 50, the alleged value of the plaintiff's baggage and effects put on board of the schooner *Hero*, commanded by the defendant. The petition charges that, on the 16th of July, 1842, the plaintiff, being then in Havanna, engaged and paid his passage for New Orleans on board of this schooner, and was informed by the captain that she would sail on the 19th; that on the 18th, plaintiff sent on board his baggage, consisting of a large trunk and cedar box, a mahogany box, a night bag, hat case, &c.; that this baggage was received by the defendant himself, who then informed plaintiff that the *Hero* would sail only on the 20th of July, and that it would be sufficient for him to be on board that very day, at 6 o'clock in the morning; that nevertheless the *Hero* sailed on Tuesday, the 19th, without any further notice to the plaintiff, who remained in Havanna; that the baggage was seen on board of the *Hero* during the voyage to New Orleans, but was not to be found on board in this port; and that the defendant now denies having ever received it on board. The defendant avers that he has no knowledge of the facts alleged, and pleads the general issue. There was a judgment below in favor of the plaintiff, and the defendant appealed.

This case turns entirely on a question of fact. After a careful
Vol. VI. 38

examination of the evidence, we think that it preponderates in favor of the plaintiff, and sustains the judgment appealed from. Two witnesses testify that the effects claimed were put on board of the schooner Hero in Havanna, and taken charge of by the captain; that the Hero having sailed sooner than had been announced, the plaintiff, not being able to reach her, was obliged to take passage on board of another vessel. One of the passengers of the Hero from Havanna to New Orleans, declares, that he saw the baggage in question during the voyage, and fully describes it, and that it was claimed by no one, and remained untouched during the whole voyage. The value of the contents of the trunk and boxes is proved, as nearly as can reasonably be expected under the circumstances of the case. Two persons who aided the plaintiff in packing up his effects in Havanna, and had frequently seen them in his room, testify to the correctness of a bill made out by the plaintiff of all the articles, and declare that the prices affixed to them are moderate. In the trunk there was a large quantity of fine wearing apparel; and in the boxes, books and valuable mathematical instruments. The value of the last mentioned articles is also proved by another witness, an engineer by profession.

There exists between the testimony of these witnesses and those of the defendant, contradictions on several circumstances, which have been relied on with a view to show that the plaintiff is mistaken as to the vessel on board of which he put his baggage. These contradictions, and the negative testimony of persons who did not see the things put on board, cannot out weigh and destroy the positive and explicit declarations of the plaintiff's witnesses, that they took the baggage on board, and delivered it to the defendant, and that they recognize in this port both the schooner and the captain they had seen in Havanna; and their testimony is corroborated by that of a passenger who saw the plaintiff's baggage on board during the voyage. Unless these witnesses are altogether disbelieved, the plaintiff must recover. We cannot consider them as suspicious characters, or as unworthy of belief, because it is proved that they left Havanna without passports, when they probably knew that none would be required of them on their arrival here.

Judgment affirmed.

BENJAMIN FRANKLIN FRENCH, Dative Testamentary Executor of **Bernard Fox**, deceased, *v.* **DENIS PRIEUR**, Recorder of Mortgages for the City and Parish of New Orleans.

Mortgage creditors of a succession are entitled to notice of any application made by the executor to sell the property on which their mortgages exist.

A sale of the property of a succession, legally and regularly made under a judgment of a Court of Probates, discharges the mortgages on it given by the deceased. The purchaser takes the property free of the incumbrances; and the Probate Court may order their erasure.

A District Court cannot issue a mandamus to a Recorder of Mortgages, commanding him to erase certain mortgages, without having notified the parties interested.

On an application for a mandamus to compel the erasure of the mortgages existing on property sold by order of a Probate Court, the declaration of the applicant is not the best evidence of the sale; the *procès verbal* of the sale and adjudication should have been produced.

APPEAL from the District Court of the First District, *Buchanan, J.* The plaintiff, as dative testamentary executor of **Bernard Fox** deceased, presented a petition to the District Court, representing that a sale had been made, under the orders of the Probate Court, of certain property belonging to the testator, for the purpose of paying the debts of the succession; that he desires to cancel certain mortgages existing on the property, which the defendant, as Recorder of Mortgages, refuses to do. The applicant prays for a mandamus to the Recorder commanding him to erase the said mortgages, or to show cause why he should not. The defendant answered, that being a merely ministerial officer, it is not his province to decide whether the mortgages should be erased, or not. No other parties were notified. The evidence on the trial of the rule, is stated in the opinion of the court, *infra*.

Mitchell, for the plaintiff, cited *De Ende v. Moore*, 2 Mart. N. S. 336. *Joyce v. Poydras de Lallande*, 6 La. 283. *Zacharie's Adm'r. v. Prieur et al.*, 9 Ib. 197. *Hoey, &c. v. Cunningham*, 14 Ib. 86.

Roselius, for the appellant. This is an application for a mandamus to compel the Recorder of Mortgages to cancel certain mortgages registered against the late **Bernard Fox**, on the allegation that the property subject to the mortgages has been sold, by

order of the Court of Probates. The Recorder of Mortgages answers that he is a ministerial officer, and, as such, not competent to decide on the rights of the parties interested in the question. He is under the impression that the mortgage creditors whose rights are sought to be affected, should be cited before the Court of Probates, or other competent court, and that a decree to cancel their mortgages ought to be rendered contradictorily with them. It is not denied that the sale of succession property for the purpose of paying debts, affords a sufficient reason to authorize the court, by whose order the property has been sold, to order the erasure of the mortgages recorded against it. The cases cited by the counsel for the appellee fully establish that proposition. But it has never yet been decided that the Recorder of Mortgages, who is invested with no judicial authority, is bound to take cognizance of an *ex parte* representation made to him by an executor, or other administrator of a succession, and thereupon cancel the mortgages on his records. No law gives him any such authority. The 3335th and 3336th articles of the Civil Code provide, on the contrary, in express terms, that mortgages can be erased only "*by the consent of the parties interested and having capacity for that purpose ;*" or "*by virtue of a judgment ordering such erasure.*" It follows, as a necessary consequence, that the District Court erred in issuing the peremptory mandamus, from which this appeal is taken.

The counsel for the appellee supposes that no other case can be adduced in support of this opinion than that of the *State v. Judge Le Blanc*, 5 La. 329. In this he is mistaken. The first case in which the question arose and was decided, is that of *Walden v. Duralde*, 7 Mart. N. S. 464. Walden sued Duralde, who was then Recorder of Mortgages, to compel him to omit in his certificate a judicial mortgage recorded against Livingston, the former owner of the property in question. The court observed ; "It is clear that on the prayer of the petitioner, as far as it goes to the court declaring that there exists no mortgage, and prohibiting the defendant to state any in his certificate, nothing could be done in a suit to which the United States are not a party. They ought to be heard before any judgment, affecting any right of theirs, be given." So in the case of *Waters et al. v.*

French, Executor, v. Prieur, Recorder.

Mercier, 4 La. 14. There, the plaintiff was entitled to have the mortgage cancelled, but the court decided that the Recorder of Mortgages ought not to have been made a party to the suit; consequently he was dismissed with costs, although the other defendants were condemned to cancel the mortgage. In the case of the *State v. Judge Le Blanc*, 5th La. 329, 330, the same rule is laid down. In that case property had been sold by order of the court of Probates to effect a partition, and a mandamus was applied for to compel the Judge under whose decree the sale had taken place, to grant an order to erase certain mortgages. The court said; "We are of opinion that this question cannot be decided with the Judge, but that it must be by a proceeding, to which those having an interest, real or pretended, adverse to the applicant, are made parties." The last and strongest case to which I will call the attention of the court is that of *Gasquet et al. v. Dimitry*, 6 La. 454. That was an application to compel the Sheriff to cancel subsequent mortgages under the 708th article of the Code of Practice. The provisions of that article are, "*that the Sheriff shall give a release from these mortgages.*" Notwithstanding such imperative language, the court observed: "that the first duty of a Judge is to hear a party, before he makes a decision to his injury."

GARLAND, J. The petitioner alleges, that for the purpose of paying the debts of the estate of Fox, the Court of Probates of the Parish of Orleans, ordered a sale of the property to take place at public auction, by the Register of Wills; at which sale, certain lands and lots were sold, on which the deceased had given mortgages to different persons; that he is desirous of erasing these liens from the records kept in the defendants' office, and that for this purpose he has made a public act, authorizing and requiring the said defendant to erase the same, which has been presented to him and which he declines to comply with, without any good and legal cause; wherefore the petitioner asks for a rule on the said Recorder of Mortgages, to show cause why a mandamus should not be issued, compelling him to cancel said mortgages, and erase them from his records.

The answer to the rule is, that being a ministerial officer, it is not his duty, or within his province to decide whether the mort-

gages should be cancelled and erased, or not ; and he asks to be discharged.

The evidence offered by the petitioner, is a petition presented to the Court of Probates by his predecessor in the office of executor, praying for a sale of the property belonging to the estate, for the purpose of paying the debts, at the foot of which is an order of the Judge, directing the property to be sold after the legal advertisements ; also an act, or declaration made by the petitioner before a Notary Public, in which he describes the lots sold, and the mortgages upon them, and recites that the Register of Wills has sold them, in obedience to the order of the court, wherefore he (the petitioner,) authorizes the erasure and cancelling of the mortgages, and releases the same. It is not shown that any other evidence than the last mentioned act, was presented to the Recorder of Mortgages ; nor does it appear that the application to sell the property, was ever notified to any person, either creditor or heir ; nor is it shown by any act, or certificate from the Court of Probates, or the Register of Wills, that the property has been sold conformably to law, and the order of the court.

In 3 Robinson, 35, we held, that an executor could not sell the property confided to his charge, without notice to the heirs, as it might be their interest to furnish him with money to pay the debts and legacies, and thus prevent a sale. Mortgage creditors have by law, certain rights secured to them, in relation to the sale of property belonging to successions ; and it would seem but just, that they should have some notice of an application to sell that on which their lien exists, and thereby to discharge it. There cannot now be a doubt that a sale of the property composing a succession, legally and regularly made under a judgment of the Court of Probates, discharges the mortgages on it, which may have been given by the deceased. The purchasers take it free of any such incumbrances, and the Court of Probates has the power to erase them all. 17 La. 378 ; 9 La. 197 ; 2 Mart. N. S. 224, 336. But we know of no authority that the District Court has to issue a mandamus to the Recorder of Mortgages, commanding him to erase mortgages, without notifying the parties interested in them. The cases reported in the 9 and 17 La., originated in the Court of Probates, and the parties interested were notified.

Cassidy v. His Creditors.

See also 5 La. 329. Independent of this fatal objection, there is no other evidence of a sale having been made than the declaration of the applicant for the rule, which is insufficient. The *procès verbal* of the sale and adjudication, is the best evidence, and forms a title to the purchaser.

The judgment of the District Court is annulled and reversed, and the rule prayed for discharged; the appellee paying the costs in both courts.

JAMES CASSIDY v. HIS CREDITORS.

Where a mortgage creditor of an insolvent who has made a cession of his property appeals from a judgment, allowing the sums claimed by certain law officers for their fees, the latter must be made parties to the appeal. It is not enough that the syndic, who has no interest in a contest between privileged creditors as to their relative rank, should be cited.

APPEAL from the District Court of the First District, *Buchanan, J.*

Greiner, for the appellant.

Grivot, for the syndic.

MORPHY J. This case has been before us several times. When last up it was remanded, because it did not appear that the Judge had passed upon certain law charges in the syndic's tableau of distribution, which had been opposed by Wm. J. Moffat. On the return of the case to the District Court, the Judge, after notifying the parties whose claims were disputed, and hearing their evidence, fixed the amount of fees due to the Clerk, Sheriffs and Coroner, and decreed that their charges, and certain other items on the tableau, should be paid by privilege and preference over the mortgage debt of Moffat, out of the funds in the hands of the syndic.—Moffat has appealed.

He contends, in this court, that the accounts of the Clerk, and of two late Sheriffs against the estate, have not been legally proved, and has referred us to several provisions of law prescribing the

manner in which these officers must prepare their bills of costs, and the formalities to be fulfilled before they can obtain payment from suitors. Acts of 1833, p. 190. Acts of 1814, p. 108. Law of 1842, p. 440. The Judge below might, and, we think, should have required of the Clerk a detailed bill of his fees, such as was presented by the Sheriffs and Coroner; but as the services of this officer were rendered in his Court and under his eye, he felt authorized, and was perhaps competent, to fix the amount due to him for his services to the estate, without requiring a detailed account, and from the simple inspection of the books out of which such an account could have been made; but, be this as it may, we cannot disturb the judgment rendered in favor of the Clerk, Sheriffs, Coroner, &c., without having these persons before us. The syndic, who has been decreed to pay these amounts out of the funds in his hands, has not appealed from this judgment. If Moffat, in preference to whose mortgage these charges were ordered to be paid, was desirous of contesting them in this court, he should have made these persons parties to this appeal. It is a contest between him, and them, in which the syndic is without any interest, especially when it is considered that there is nothing coming to the ordinary creditors of the estate. So far then as the syndic, who is the only appellee in the case, is concerned, the judgment complained of cannot be touched. 1 Robinson, 275.

As to the sum of \$175 in the hands of the syndic, independent of the price of the slave Richard, withheld by Moffat under his mortgage, we understand the judgment below to decree that it shall first be appropriated to the payment of the privileged expenses, and that the mortgage creditor can be made to pay only the deficiency.

Judgment affirmed.

The Mexican Gulf Railway Company v. Viavant, Administrator.

THE MEXICAN GULF RAILWAY COMPANY v. AUGUSTE VIAVANT,
Administrator of the Succession of Antoine Bienvenu, deceased.

Under the provision of the 15th sect. of the act of 9th March, 1837, incorporating the Mexican Gulf Railway Company, declaring that "if any stockholder shall fail to pay any instalment required to be paid, for the period of thirty days next after the same shall have become due and payable, the stock on which such instalment shall have been called in, shall be forfeited to the Company," it is optional with the Company under the circumstances mentioned, in a contest between it and the stockholder, to declare the stock and the sums paid in forfeited, or to require the execution of the obligation of the stockholder, by paying the whole amount of the shares subscribed for by him.

A subscriber for the stock of an incorporated company cannot take advantage of any informalities in the manner of his subscription, unless in case of fraud or error. He will be bound to pay the amount subscribed by him, though books of subscription were not regularly opened according to the charter.

APPEAL from the Parish Court of New Orleans, *Maurian, J. L. Janin*, for the plaintiffs.

Rousseau and Budd, for the appellant.

SIMON, J. The administrator of the estate of Antoine Bienvenu, deceased, sued for the amount subscribed for by the deceased to the capital stock of the Mexican Gulf Railway Company, pretends, among other matters by him pleaded in his defence, that the charter of the said company, by providing "that if any stockholder shall fail or neglect to pay any instalment required to be paid for the period of thirty days next after the same shall have become due and payable, the stock on which such instalment shall have been called in, *shall be forfeited* to the company, (see page 56 of Laws of 1837,) precludes the plaintiffs from recovering the amount of the shares subscribed for, or in other words, that the company has no other remedy than the forfeiture of the stock.

There was judgment below in favor of the plaintiffs, and the defendant appealed.

The facts established by the evidence show, that Antoine Bienvenu subscribed for twenty shares of the capital stock of the Mexican Gulf Railway Company, amounting to \$2000, no part of which was ever paid by the subscriber; that nine calls were made

on the stockholders for ten dollars on each share subscribed by them, and one call was made on them for eight dollars per share. Two dollars were to be paid in, at the time of subscribing. The deceased was called on several times for the payment of the instalments called for by the direction, or for his notes, with six per cent interest, according to the resolution of the Board of Directors; but he always refused to pay, or to give his notes with interest, consenting however, to give his notes without interest. The evidence further shows that the object of the charter has been partly complied with by the Company's making about nineteen miles of road; that said Company is very much embarrassed, and unable to meet its engagements punctually; and that advertisements calling upon the stockholders to pay the proportions required by the Board of Directors, were regularly published according to the provisions of the charter. The several resolutions of the Board, fixing the proportions to be called for from the stockholders, were also produced in evidence; and it is no where mentioned in the said resolutions, nor in the advertisements, that the Board of Directors ever intended to avail themselves of the penalty or clause of forfeiture contained in the 15th section of the charter. Nay, such penalty, or forfeiture, is not even alluded to in any of their proceedings exhibited by the record, and does not appear to have ever been in the contemplation of the Board of Directors.

We concur with the Judge, *a quo*, in the opinion, that the faculty allowed by the charter, of declaring such forfeiture, can only be considered as a penal clause, which the plaintiffs might or might not avail themselves of, but which, if they did not choose to avail themselves of it, by notifying the stockholders of their determination to do so, did not deprive them of the right of requiring the execution of the obligation contracted by the stockholders respectively, and of instituting an action against the defaulting stockholders for that purpose. The question here presented is, between the Company and one of the stockholders; and, under the 15th section of the charter, we are perhaps free to admit, that, as between themselves, at least, the remedy is *alternative*; that is to say, that the charter makes it optional with the Company to exact the penalty, by declaring that the stock, or the sums paid in, *shall be forfeited*, in case of non-payment, within thirty days, of any of

the instalments called in; or to require absolutely the execution of the obligation contracted by the stockholder, of paying the whole amount of his shares. Art. 2120 of the Civil Code, which supports this position, provides, that "the creditor, instead of exacting the penalty stipulated from the debtor who is in default, may sue for the execution of the principal obligation:" and Pothier, (Obligations, No. 342,) says: "*Quoiqu'il y ait eu ouverture à l'obligation pénale par la demeure, en laquelle a été le débiteur d'exécuter l'obligation principale, le créancier peut, au lieu de demander la peine stipulée, poursuivre l'exécution de l'obligation principale.*" See also Toullier, Vol. 6, No. 465,—and 21 Wendell, 273. It is clear, therefore, that the plaintiffs, who are not shown to have ever done any act evincing an intention on their part to avail themselves of the forfeiture allowed by the charter, and whose resolution to exercise the faculty of declaring such forfeiture, if ever taken, does not appear by the record, and never was notified to the stockholders, were always at liberty to proceed against the deceased in his lifetime, to compel him to execute his principal obligation, and to sue him for the amount of his subscription.

We conclude that the plaintiffs are entitled to recover the amount of the twenty shares subscribed for by the deceased.

With regard to the objection urged by the defendant's counsel, that no books were ever opened according to the charter, and that, if opened, they never were exhibited or shown to the deceased, who subscribed for his shares upon a list, or *loose sheet of paper*, presented to him by three persons who called upon him for that purpose, we think it is untenable. The evidence shows, that the deceased knew the nature and object of the obligation which he was contracting; that he subscribed with his eyes open, and for the very object contemplated and provided for by the charter; that although he refused subsequently to pay the amount of his subscription, or to give his notes with interest, he was willing to give his notes without interest for the whole amount of his stock; and we think it does not lie in the mouth of the administrator of his estate, to dispute the validity of an obligation contracted in good faith by the deceased. A very similar question was lately decided by us in the Western District, in the case of the *Red*

River Rail Road Company v. Young, in which we held, in substance, that a stockholder cannot take advantage of the informalities existing in the manner in which his subscription was obtained, unless there was fraud or error, and that he is bound to pay the amount of his subscription, though books were not regularly opened according to the charter of incorporation. 6 Robinson, 39.

Judgment affirmed.

THE STATE V. ABNER PHELPS, Clerk of the City Court of Lafayette.

Under the 18th section of the act of 28 March, 1813, a Clerk may require of an appellant security for the costs of making a transcript of the record; and, if not furnished, he may refuse to prepare it. The surety given in the appeal bond is not enough. The bond is conditional, and should the appellant succeed, the surety would be discharged. The Clerk has a right to require that the security be absolute, and that the solvency of the surety shall appear to his reasonable satisfaction. But he exercises his judgment at his peril.

RULE to show cause why a mandamus should not be issued to Phelps, Clerk of the City Court of Lafayette.

Wills, for the application.

Phelps, pro se.

MARTIN, J. A rule was issued against the defendant, Clerk of the City Court of Lafayette, to show cause why he should not be ordered to make out the record in the case *Joel Thompson vs. William Ayres*, and deliver the same to the applicant, the appellant in that case. The Clerk showed for cause, that the applicant is a non-resident of the State; that he has no apparent means of discharging debts; that he had been cast in the suit; and was informed that the respondent was authorized by law to, and did require security for the costs of making the transcript, under an act of the Legislature; Bullard & Curry's Digest, 444, sect. 18. That it is true the applicant had given an appeal bond, but that the surety therein is notoriously insolvent. The surety not

Baldwin v. Bennett and others.

having been given, the respondent did not think himself bound to make the transcript.

It has been contended, that an appeal bond having been given, the Clerk had therein sufficient security. It is clear, that this bond did not suffice; for the appellant, the principal in the bond, might have succeeded in the appeal, and the surety would thereby have been discharged, the bond being conditional. The Clerk has a right to require that the security be absolute, and the solvency of the surety appear to his reasonable satisfaction. He exercises his judgment thereon at his peril. Nothing shows that he had the opportunity to exercise his judgment on the solvency of the surety on the appeal bond. We cannot, therefore, be precluded by that document.

Rule discharged.

EBEN FRANKLIN BALDWIN v. JOSEPH BENNETT and others,
Owners of the Steamer John Jay.

The provision of the 17th sect. of the act of 10 February, 1841, which declares that the cases then pending before the District Court of the First District, and the Parish and Commercial Courts of New Orleans, "shall be stricken from the jury docket, unless the compensation fixed by that act to be allowed to jurors, be advanced by the party demanding a trial by jury," is not unconstitutional. *Per Curiam*. Under the twentieth section of the sixth article of the State Constitution no acquired rights, or existing contracts can be affected by subsequent legislation; but it is otherwise as to remedies and forms of proceeding. Whatever relates to the manner of conducting and trying a suit, (*litis ordinatio*), is always within the control of the Legislature, which can, at any time, make any change, or modification it may think conducive to the public good and the proper administration of justice.

APPEAL from the Parish Court of New Orleans, *Maurian, J.*
J. C. Clarke, for the plaintiff.

Van Matre, for the appellants.

MORPHY, J.* This suit is brought to recover the sum of four

* This opinion was delivered in June, 1843. So much of it as was overruled by the subsequent opinion on the re-hearing, is omitted.

hundred dollars, alleged to be due to the petitioner, for his services as pilot on board the steamer John Jay during two months, at the rate of \$200 per month, commencing on the 16th of November, 1838.

The defence is, that on or about the time mentioned in the petition, the plaintiff engaged and agreed to serve as a pilot on board of the John Jay in the Arkansas trade, and to continue thereon from that time, until the expiration of the steamboat season on the Arkansas river, which usually terminates on or about the 1st of July of each year; that on the 10th of January, 1839, the boat left this city, with a full cargo of freight and a lot of passengers, for Fort Smith, on the Arkansas river, and the intermediate landings; that on or about the 16th of January, at the mouth of White river, and when the voyage had but fairly commenced, and long before the termination of the season, the plaintiff, without any just cause therefor, and without any previous intimation of his intention so to do, deserted and abandoned the John Jay, contrary to the will of the captain thereof, and took a birth as pilot on board the steamboat Burlington, engaged in the same trade; that as no pilot could be had at the mouth of White river to supply the place of the plaintiff, the captain was compelled to run the boat to Fort Smith, and return to New Orleans with but one pilot on board, lying by a part of every night, and sustaining damage by the wrongful conduct and breach of contract of the plaintiff, in the sum of \$500, which is pleaded in reconvention. There was a judgment below for three hundred and seventy-five dollars in favor of the plaintiff. The defendants have appealed.

Our attention has been called to a bill of exceptions taken by the defendants, to the opinion of the inferior Judge refusing to reinstate this case on the jury docket, from which it had been stricken, in obedience to the 17th section of the act approved the 10th February, 1841, entitled "An act to create two additional Sheriffs for the parish of Orleans, to fix the place of holding courts of justice, and for other purposes." The ground taken was, that so far as the statute tends to regulate and control the trial of cases which were instituted, and in which juries were prayed for prior to its passage, it violates the twentieth section of the sixth article of the Constitution of the State, and is, therefore, void. The

Judge was clearly right. Under the constitutional provision relied on, no acquired rights and existing contracts can be affected by subsequent legislation ; but it is otherwise with regard to remedies and forms of proceeding. Whatever relates to the manner of conducting and trying a suit, (*litis ordinatio*,) is always within the control of the Legislature, who can, at any time, make any change or modification they may think conducive to the public good, and a proper administration of justice in our courts.

SAME CASE—ON A RE-HEARING.

Action by the plaintiff for two months wages as the pilot of a river steamer. It was proved that he had been employed for the season, at certain wages, payable monthly ; that having determined to leave the boat, he applied to the clerk in the middle of a voyage, for the payment of two months wages then due, who refused to pay him then ; that he never applied to the captain for payment, never informed him of the refusal of the clerk, nor gave him any notice of his intention to leave. It was shown that the captain remonstrated with him for leaving, and that his departure injured the voyage ; also that the steamer had made one or more voyages during the first month, and had earned freight, by which the defendants were benefited. *Held*, that neither the expiration of the month, nor the failure to pay his wages, for which the law gave him a privilege on the vessel, justified the plaintiff in leaving the steamer during the voyage ; that by doing so, he forfeited the wages of the last month ; but that one or more voyages having been made during the first month, by which freight was earned, plaintiff should have been paid the wages of the first month, and that they were not forfeited by his subsequent desertion.

The well settled principles of maritime law, that where an officer or seaman employed for a voyage, at monthly wages, voluntarily leaves the vessel, before its termination, without good cause, or the assent of the master, he will forfeit his wages—that if the vessel be lost and earns no freight, the mariner gets no pay, though engaged by the month—and that even where no definite voyage is specified or *terminus* fixed, the contract is subject to the equitable restriction that it shall not be terminated at a time, or under circumstances particularly inconvenient to the other party, should be extended as far as applicable, to persons engaged in the navigation of our rivers and along our coasts.

GARLAND, J. On the application for a re-hearing, we have again attentively looked into the facts of this case, and the law which governs it, and have concluded to modify our former judg-

ment. The pretext of the plaintiff for leaving the boat during her voyage was, that two of the months for which he had been engaged had expired, and that his wages had not been paid to him. The evidence shows very satisfactorily, that he had determined to leave the boat, before he applied for the payment of his wages. When at the mouth of the Arkansas river, bound up, he left a message for the captain of the steamer Burlington, stating that he should leave at the mouth of White river. He also informed the other pilot on the boat of his intention to quit, and of his having received a communication from the captain of the Burlington, who wished to employ him. It is further shown, that at the mouth of White river he made all his preparations to leave, before he applied to the clerk for his wages. He never did apply to the captain for payment; nor did he give him any notice of his intention to leave his service until after he had done so, nor did he inform him of the refusal of the clerk to pay, before doing so. When the captain heard that the plaintiff had left, or was about doing so, he remonstrated against it, and told him of the injury he would probably sustain, by being left during the voyage: and further, that if he would continue until the boat returned to New Orleans, he would pay his wages, and consent to his discharge. This the plaintiff refused to do. It also clearly appears, that the boat was considerably delayed on the voyage, in consequence of having but one pilot, which caused the owners some loss.*

It is a well settled principle of maritime law, that if, on a voyage, an officer or seaman voluntarily leaves the vessel, without good cause, or the assent of the master, he thereby not only forfeits his wages, but in some cases is liable to be arrested as a deserter and punished; and it makes no difference whether he is employed for the voyage, or at monthly wages. See *Rights and Duties of Merchant Seamen*, p. 62, 69. The contract, when on a voyage, is not determinable by either party at the expiration of each month. If it were, a vessel in the middle of a voyage might be abandoned by her whole crew, and no one left to navigate

* The clerk testified that the plaintiff had been employed for the season, at the rate of \$200 month, payable monthly.

her. The contract extends to the voyage, at the rate of so much per month; and if the vessel is lost, and earns no freight, the mariner gets no pay, although he is engaged by the month. Even where no definite voyage is specified, or *terminus* fixed, and, of course, an end can be put to the contract at any time, yet it is "subject to the equitable restriction that this shall not be done at a time, or under circumstances, particularly inconvenient to the other party." Ware's Rep. 437. Pothier says, the obligation does not cease until the end of the voyage and the discharge of the vessel; and it is the same, whether the hiring is by the month or voyage; and the only difference is in the mode of payment. *Traité du Louage des Matelots*. We are of opinion that these well settled principles of law, should extend, so far as they are applicable, to persons engaged in the navigation of our rivers, and along our coasts. Steamboats sometimes make voyages, as long as vessels engaged in foreign trade, and are often in places where neither competent officers, nor hands can be procured. Under such circumstances, it would not only be highly injurious to individuals, but to commerce, if it were permitted to the officers and crew, or any portion of them, to leave, because the month for which they were engaged had expired. Captains and owners of steamboats, should punctually discharge their engagements to the officers and men in their service; but if they do not, it does not justify them in deserting the vessel on a voyage. The law gives them a lien to secure the payment of their wages, and they must not leave the vessel on which it exists, when there is the greatest need for their services. We have finally come to the conclusion, that the plaintiff was not justifiable in leaving the John Jay when he did, and that he should forfeit the wages of one month. The defendants contend that the wages of both months should be forfeited; but we do not think they should. The boat made one or more voyages during the first month, and earned freight, by which the defendants were benefited, and at the end of it, they ought to have paid the plaintiff his wages. Had they done so, there could have been no forfeiture of them.

The counsel for the plaintiff contend, that as he was shipped at the mouth of White river and had returned there, and it was a place where pilots for the Arkansas river were often to be found,

Mary v. Lampré.

and could be engaged, their client had a right to leave the boat at the end of the month, without notice. Had the mouth of White river been one of the *termini* of the voyage, this would probably be correct ; but it was not. The plaintiff knew when he left the port of New Orleans, that the steamer was engaged on a much longer voyage, and that the freight would not be earned, unless she reached her point of destination. It was his duty to do all in his power to effect that object, and to enable the vessel to earn the means to pay him. If a mariner were to ship on board a vessel in the port of Havanna, bound to New Orleans, at a certain rate per month, and from thence the vessel should depart on a voyage to Liverpool and touch at Havanna, it could not be contended that the mariner would have a right to desert the ship, simply because he had returned to the place he went from, the month had expired, and other mariners could be procured at that place. He would be bound to remain, because he was then bound on another voyage. A change of a portion of the crew in an intermediate port, sometimes produces a forfeiture of a policy of insurance.

It is, therefore, ordered and decreed, that the judgment of this court, affirming the judgment of the Parish Court, be so modified, that the plaintiff recover of the defendant, *in solido*, the sum of two hundred dollars, with a privilege and lien on the aforesaid steamboat John Jay, to secure the payment of the same, together with the costs in the lower court, those on the appeal to be paid by the plaintiff.

ADELAIDE MARY v. FRANÇOIS LAMPRE.

Where the name of a party forms a part of the commercial name of a partnership against whom a judgment has been obtained, it is, at least, *prima facie* evidence that he was a member of the firm ; and a *fi. fa.* levied on his property to satisfy the judgment, will be maintained, unless it be shown that he was not a member.

Under the 5th section of the act of 2th of March, 1827, creating the office of Register of Conveyances for New Orleans, a sale of real estate can have no effect against third persons, but from the date of its registry ; and where a judgment gains a vendor was recorded by the Register of Mortgages, before the registry in the conveyance office of the sale from him, the sale will be without effect as to the judgment creditor ; and this, though a sale of the same property, from the first vendee to the plaintiff, was registered before the judgment was recorded.

Mary v. Lampré.

APPEAL from the District Court of the First District, Buchanan, J.

Canon, for the plaintiff.

Soulé for the appellant.

MARTIN J. Lampré is appellant from a judgment perpetuating an injunction obtained by the plaintiff, to prevent the sale of a lot of ground which she claims as her property, to satisfy a judgment in favor of the appellant against Kokernot & Co; the District Court, having been of opinion that the evidence did not show who were the members of the firm against whom the judgment was obtained, or that Louis Kokernot, the plaintiff's vendor, was one of them. The grounds upon which the judgment of the District Court rests, have not been urged by either party in this court. Indeed, they do not appear to us tenable. Louis Kokernot is at least, *prima facie*, one of the defendants in a judgment obtained against Louis Kokernot & Co.; and on a *fi. fa.* issued on such a judgment, the Marshal can well seize a lot which appears on the records of the Register of Conveyances to have been acquired by Louis Kokernot, and does not appear to have been alienated by him. The plaintiff contends that she is the owner of said lot, which she shows to have been purchased by her from Morgan, to whom it was sold by Bertrand, who had bought it from Kokernot. She shows that the sale from Bertrand to Morgan, and that from Morgan to her, have been duly recorded in the office of the Register of Conveyances. But the defendant shows, that the sale by which Kokernot acquired the lot was duly recorded; that no sale from Kokernot was recorded until the 20th of November, 1839, at which time the mortgage resulting from the record, by the Recorder of Mortgages, of the defendant's judgment against him, gave him a mortgage on the lot; consequently, as to the defendant, Kokernot was the owner of the lot on the 11th of December, 1838, when the judgment against him was recorded. Till then, his sale to Bertrand had no effect against the defendant, who was a third party. The judicial mortgage then bore on the lot, and was not destroyed by the subsequent record of Kokernot's sale to Bertrand, registered on the 20th of November, 1839, nearly one year after; nor by the registry of Bertrand's sale to Morgan, and that of Morgan to Rey, although the first of

Mary v. Lampré.

these was registered a few days before the judgment; because Bertrand's title did not ripen until that of his vendor was divested, a circumstance which did not happen until a long time after the record of the judgment had affected it with a judicial mortgage.

It is, therefore, ordered and decreed that the judgment be annulled and reversed; that the injunction be dissolved; and that the appellant recover from the appellee damages at the rate of five per cent on the amount of the judgment, the execution of which has been enjoined, with interest at the rate of five per cent, and the costs in both courts.

SAME CASE—APPLICATION FOR A RE-HEARING.

GARLAND J. This is a hard case upon the plaintiff, and we have re-examined it with an earnest desire to grant relief, if the law would permit us to do so; but the 5th section of the act of the Legislature creating the office of Register of Conveyances for the city of New Orleans, appears so peremptory, that we cannot disregard its positive provisions. The statute was made for the protection of innocent third persons, and is one of public utility. It says, that "said acts, whenever they are not registered agreeably to this law, whether they are passed before a Notary Public or otherwise, shall have no effect against third persons, but from the day of being registered." B. & C.'s Dig. 603.

In this case Lampré obtained his judgment against Louis Kokernot & Co., had it recorded, and an execution issued and levied on the premises in question, previous to the registry of the sale from Louis Kokernot to Bertrand. His lien on the property had attached and become vested, and we cannot deprive him of it, however severely it may operate on the plaintiff. The case of *Williams v. Hagan, &c.*, 2 La. 122, is nearly similar to this; and the principle is sustained by that of *The Syndic of McManus v. Jewett*, 6 La. 540.

The counsel for the plaintiff contends, that his client should not suffer from the neglect of the Notary to have the act passed, before

Talhaud v. His Creditors.

him, recorded. Upon this point all we can say is, that if it were the duty of the Notary to have the act recorded, and he has failed to do so, and damage has resulted, the parties must look to him. Lampré cannot be deprived of his right acquired in consequence of his neglect, and be made responsible. He has done what the law authorized him to do, and he is entitled to the benefit of it.

The counsel further insists upon the reason given by the Parish Judge for maintaining the injunction ; that is, that there is no proof that Louis Kokernot was a member of the firm of Louis Koker-not & Co. We do not well see what that has now to do with the question. It was not denied in the petition for the injunction, and was in no manner an issue between the parties. No evidence was taken in relation to it by either party. It is hardly to be believed that if he were not a partner, the objection would not have been stated in the petition, or on the trial.

It is ordered that the judgment remain undisturbed.

PIERRE MONTFLEURY TALHAUD v. HIS CREDITORS.

Where the syndics of the creditors of an insolvent have failed to furnish the bond required by law, a creditor may take a rule on them to show cause why another meeting of the creditors should not take place, to appoint other syndics in their place ; and the rule will be made absolute, in the absence of proof of a compliance with their obligation to furnish a bond. The creditor was under no obligation to take a rule on them to show cause why they should not give bond.

APPEAL from the Parish Court of New Orleans, *Maurian, J.*
J. Seghers, for the appellants.

L. Peirce, appellee, *pro se*.

MARTIN, J. The syndics are appellants from a judgment making absolute a rule obtained by Peirce, one of the creditors, requiring them to show cause why a new meeting of the creditors should not take place to appoint other syndics, on the ground of their having failed and neglected to give the bond required of them

Mornay v. Bordelais.

by law. They claimed the discharge of the rule, on the grounds that no opposition was filed to their appointment, within ten days ; and that the only course which could be taken against them was to require them to show cause why they should not give bond. They contend that any other course tends to involve the estate in difficulties, by invalidating their acts as syndics, and virtually annulling several judgments of rescissions obtained against them.

It does not appear to us that the court erred. The appellants might have easily claimed the discharge of the rule by giving the bond which the law required of them. Had a rule been taken against them, as they contend, to show cause why they should not give the bond, another rule would have become necessary, of the character of the present one.

The plaintiffs in the judgments of rescission, mentioned by the appellants, are not before us ; and it is not proper that we should express any opinion on the effect, which the appointment of new syndics may have on their acts.

Judgment affirmed.

JEAN MORNAY V. PHILIBERT BORDELAIS.

An account rendered by an agent to his principal is conclusive against the former, unless he show clearly errors or omissions to his prejudice.

APPEAL from the District Court of the First District, Buchanan, J.

Roselius, for the plaintiff.

Canon, for the appellant.

BULLARD, J. On the 3d of June, 1839, the defendant rendered to the plaintiff an account of an agency with which he had been charged, showing a balance in favor of the principal of \$1044 60 ; and, on the 21st of March, 1840, this suit was instituted to recover the balance thus admitted to be due.

The defendant, after setting up the exception of *litis pendentia*, which was overruled, pleaded that he had been the agent of

Mornay v. Bordelais.

the plaintiff in matters of great importance and intricacy, and that when in Bordeaux, in June, 1839, had furnished a *provisional*, not a final account of his administration. He now annexes to his answer a new and definitive account of his agency, which shows a balance of \$1357 60 in his favor, for which amount he asks judgment.

There was judgment for the plaintiff for the balance of the first account rendered, and the defendant has appealed.

The court did not err. The account rendered by the agent concludes him, unless he clearly shows errors or omissions to his prejudice. The new account relates to the same transactions, and it is not alleged, much less proved, that there was any error in the first account. It purports to be final, and to cover the whole grounds of the agency.

The judgment of the District Court is, therefore, affirmed, with costs.

SAME CASE—ON A RE-HEARING.

BULLARD, J. A re-hearing was allowed in this case on the simple question, whether any charges in the new account rendered by the defendant, of a date subsequent to the 3d of June, 1839, ought to be admitted. After an attentive examination and comparison of the two accounts, and of the parol evidence, we are satisfied, that the new account embraces no charge after the 2d of June; and that on the credit side of the account first rendered, there is an item as late as the seventh of that month.

It is, therefore, ordered, that the judgment first rendered remain undisturbed.

Allard v. Allard and another.

ANDRÉ LATOUR ALLARD v. LOUIS ALLARD and another.

An agent authorized to sell, cannot sell to himself.

The law raises no presumption of fraud from the fact that the vendor and vendee were brothers-in-law.

In an action to rescind a sale made by an agent, whose power to sell is conceded, the manner in which he disposed of the proceeds, whether in payment of the debt due to himself, or not, is a question not before the court.

Where an agent acts within the scope of his authority, his acts are valid, without showing any ratification on the part of his principal.

APPEAL from the District Court of the First District, *Buchanan, J.*

C. Janin, De Courmont and Roselius, for the appellant.

Labarre and Mazureau, for the defendants.

BULLARD, J. André Latour Allard represents in his petition, that being proprietor, jointly with Louis Allard and Louise Allard his brother and sister, each for one-third, of a plantation on the Bayou St. John, containing fourteen *arpens* front, by the depth of forty, and being about to make a voyage, about the month of May, 1825, he appointed his said brother his attorney in fact, and charged him with the administration of his affairs. That, during his temporary residence in France, his said agent sold to his partner Jean François Robert, his undivided third, for ten thousand dollars, by act before a notary bearing date the 17th of February, 1829, and, on the 8th of April of the same year, purchased back again from Robert one-half of the said third of the plantation. He alleges the nullity of the two contracts aforesaid, on the grounds: 1st. That a mandatary cannot purchase the property which he administers; and that the sale to Robert was in fact a sale to himself, Robert being merely a person interposed, in order to disguise the real character of the transaction; and that, moreover, he has never received the price. 2d. Because these sales were made to enable Louis Allard and Robert to mortgage the whole plantation to the Consolidated Association, to secure their shares of the stock, they having represented themselves as the sole proprietors, and having had the same appraised by said Bank; thus appropriating to their private use and benefit his property. 3d. Be-

Allard v. Allard and another.

cause the said sales do not carry with them the essential requisites of all contracts, the said Louis Allard being, at the same time, vendor and purchaser.

The petitioner further represents, that Louis Allard and his partner, Robert, mortgaged to the said Bank the whole plantation for one hundred and ten shares of its capital stock, and that he is entitled to one-third of said shares.

He further represents, that the said Louis Allard and Robert, jointly with Madame Robert, sold to Merle & Soulé, one undivided half of said property for \$104,000, on credit, whereby they became indebted to him for his portion of the price, to wit, \$34,666 66. That the said Louis Allard and Robert have received the revenues of said property, amounting to about \$20,000. That Robert has departed this life, and that his succession is represented by his widow, Louise Allard, as curatrix ; and that they are now in possession of said property.

He concludes by praying that Louis Allard, and his sister the widow of Robert, both in her own right and as curatrix of the estate of Robert, may be cited, and that the acts of sale may be declared null ; that they may be condemned to deliver to him the sixth of said plantation, and to transfer his portion of the Bank shares, as well as the two hundred and fifty shares of the capital stock of the Citizens Bank, also secured by mortgage on the same property ; that they be condemned also to pay ; 1st, the sum of \$34,666 66, received from Soulé & Merle ; 2d, the sum of \$19,815, for fruits and revenues, and the costs of suit.

The defendant, the widow of Robert, answered by the general denial ; and Louis Allard admits that he was appointed the agent of the plaintiff, and alleges that he has managed his affairs faithfully, and with good intentions, and that so far from owing the plaintiff any thing, the plaintiff is, on the contrary, indebted to him forty thousand dollars, for which he prays judgment in reconvention.

There was judgment of nonsuit against the plaintiff, and he has appealed.

On the trial the following facts, in substance, were established. That the plaintiff was the owner of one-third of the plantation

described in his petition, in common with his brother Louis Allard, and his sister Madame Robert. That he was indebted to his brother upwards of ten thousand dollars, which was running on interest at ten per cent. That the plaintiff left here in May, 1825, having given his brother full power to administer for him, and to sell. His power to sell the land is not contested. That the plaintiff did not return until 1832, and that, in 1829, about four years after the plaintiff's departure, Louis Allard sold the third belonging to his brother, to Robert his brother-in-law, for \$10,000, and, in a few months afterwards, bought back one undivided half of the third thus sold. That afterwards they united in mortgaging the whole to the Consolidated Association, and to the Citizens Bank. It further appears that, at the time of the plaintiff's departure, his third part of the land was mortgaged to secure the payment of the following sums: 1st, to the heirs of Galez, one-third of \$7675; 2d, to Louis Allard, \$5162; 3d, to Antoine Abat, \$4000.

In this court the argument has turned mainly upon the incapacity of Louis Allard to purchase; his right to sell to any person capable of purchasing not being disputed. The power of attorney gives express authority to sell. There can be no doubt that an agent to sell cannot sell to himself. Nor is it shown that he did so, unless we are compelled to regard Robert as a person interposed and identified with the vendor. The question, therefore, resolves itself into this—does the evidence show that Robert acquired merely for Allard, or, in other words, was he acting in collusion with the agent of the plaintiff? In support of this assumption it is argued, in the first place, that they were brothers-in-law; next, that they were partners; and then, that shortly afterwards, Robert retroceded to Allard one-half of his purchase; and these are the principal presumptions against the contract. On the other hand, it is not pretended that the price was inadequate. It is shown, that André Latour Allard was largely indebted to his brother, who might have caused the property to be sold by the Sheriff at two-thirds of its appraised value, especially after so protracted an absence, during which no effort appears to have been made by the absentee to pay his debts. And again, that although Robert had married the sister of the Allards, and she was their

Allard v. Allard and another.

co-proprietor of the plantation, nothing shows that he had been the partner of Louis Allard previous to the purchase; and further, that although he afterwards ceded to his brother-in-law one-half of his purchase, he remained, up to the time of his death, the owner of the other half. That Robert had the legal capacity to purchase, cannot be doubted; and the law raises no presumption of collusion, or fraud, or simulation, from their family connection. To all this may be added the fact, that although the plaintiff returned from France, in 1832, after an absence of about seven years, he did not institute this action until the spring of 1840, and so far as the record shows, has never had any settlement with his brother, and has never been called on by him for the payment of this heavy debt. The sale appears to have liberated him from those debts; and when it is considered, that he owned no part of the slaves, by whose labor the land might have been rendered productive; and that his agent, from 1825, to 1829, was in the receipt of no revenues of his constituent to meet even the payment of the interest accumulating on his debts, and that the price for which the land was sold, was a fair one, the plaintiff cannot reasonably complain that the power confided to his brother was indiscreetly exercised.

But it is contended, that an agent to sell under a general power, cannot legally sell the real property of his principal, for the purpose of paying a debt due to himself. To this it may be answered, that the power to sell being conceded, the manner in which the agent disposed of the proceeds forms a question of a different nature from that presented in this case. The only question now before us, according to the pleadings, is, whether the parties to the contracts in dispute were capable of contracting and did contract, or whether the whole was a fraud, or a simulation.

It is further argued, that no ratification is shown, and that it was incumbent on the defence to show such ratification, in order to make out a good title. But we are of opinion, that when an agent acts within the scope of his authority, his acts are valid, without showing any ratification on the part of his principal.

Upon the whole, we concur with the District Court in the opinion, that the plaintiff has failed to make out his case.

Judgment affirmed.

JOSEPH NASH and another v. EDWARD E. PARKER.

Where property is sold without any declaration of the mortgages existing on it, and it is not shown that the purchaser was aware of their existence, the vendor will be bound to exhibit a valid and unincumbered title, previous to calling on the vendee to perform his contract.

A purchaser who receives the rents of the property purchased, and subsequently declines to complete the contract on the ground that the vendor could not make an unincumbered title, is bound to refund the rents so received.

APPEAL from the District Court of the First District, *Buchanan, J.*

Roselius, for the plaintiffs.

Preston, for the appellant.

SIMON, J. This case was submitted without any oral or written argument. The petition states, that on the 29th of January, 1840, the petitioners caused to be sold at public auction, by a duly commissioned auctioneer, three lots of ground, which they describe, and which were adjudicated to the defendant, as the last and highest bidder, for the sum of \$5000, for each of said lots, making a sum of \$15,000, payable as follows : one-fourth cash, and the balance in three equal instalments, at six, twelve, and eighteen months' credit, for approved endorsed notes, secured by special mortgage, &c ; that after the sale, the defendant neglected and refused to comply with the terms and conditions of said sale, although he was legally put in default, and an act of sale was tendered to him ; that afterwards, said property was again sold at public auction, on the same terms and conditions, at the risk and on account of said defendant ; that at the second auction sale, the property was sold for \$10,000, making a difference of \$5000 between the first and second sales ; and that the expenses incurred, and the rents received, and the interest due on account of said property, amount to \$881 50. The petitioners pray for judgment against said defendant, for the sum of \$5881 50.

The defendant admits in his answer the adjudication made to him. He alleges that he was always ready and willing to comply with the terms of the said adjudication ; that he demanded that

Nash and another v. Parker.

the plaintiffs should transfer the property to him by act of sale ; and that the plaintiffs' failure to raise and cancel the mortgages existing on the property, and to pass him a full and unincumbered title thereto, and the subsequent sale of the same, had caused him damages to the amount of \$5000, which he sets up as a reconventional demand. He prays for judgment accordingly.

There was judgment below in favor of the plaintiffs for \$5000, from which the defendant has appealed.

This suit is brought under the provisions of art. 2589 of the Civil Code, which gives to the vendor of property offered for sale at public auction, the right, in case of the purchaser's not complying with the conditions of the sale, by paying the price at the time required, of proceeding to a re-sale of the thing sold, at the risk of the first purchaser. Such second sale fixes the measure of the liquidated damages which the delinquent purchaser is bound to pay, as the latter remains a debtor to the vendor for the deficiency, and for the expenses incurred subsequent to the first sale. We shall, therefore, proceed to examine whether the evidence sustains the plaintiffs' action, and to inquire if the defence set up is such as to liberate the defendant from the payment of the damages claimed.

The evidence shows, that the property described in the petition was adjudicated to the defendant for the sum of \$15,000, one-fourth of which was to be paid in cash, and the balance in three equal instalments, at six, twelve, and eighteen months' credit, for approved endorsed notes ; that the defendant, repeatedly called on to comply with the terms of the adjudication, gave a variety of reasons for refusing to do so, the principal of which was, that the title could not be made to him, and that the mortgages were not raised. One of the witnesses states that he heard the defendant observe to the plaintiffs' agent, that he, defendant, was and *had always been ready to take the property, the moment that the mortgages were raised and the property unincumbered* ; that this was said at a time when the plaintiffs' agent had handed to defendant a written notice in the presence of the witness. Several months having elapsed after the adjudication of the property to the defendant, the same was re-advertised for sale under the same terms and conditions ; and after its having been knocked down to the defendant's brother, for the

Nash and another v. Parker.

sum of \$12,200, said defendant, and one John Mitchell were offered as endorsers, and refused by the vendors; whereupon the property was again offered at public auction by order of said vendors, and finally adjudicated to F. Ganahl, who had acted as the plaintiffs' agent in the sale of the property, for the sum of \$10,000. The deed of sale to Ganahl, is also made a part of the record.

It further appears, by the certificate of mortgages, that the property was, at the time of the last adjudication, incumbered with mortgages to the amount of \$24,809 50: to wit, one in favor of Charles Byrne for \$7400; another in favor of the City Bank of New Orleans, for \$10,000; and a third in favor of the New Orleans Gas Light and Banking Company, for \$7409 50, exclusive of interest; all which mortgages existed also on the property at the time of the first adjudication. Nothing shows that those mortgages were to be raised after the sale; or that the creditors had, ever consented to receive the proceeds of the sale in full satisfaction thereof, except, that from a resolution taken by the Board of Directors of the City Bank, after the adjudication to the defendant, and a few days previous to the last sale, said Bank agreed to discount the paper received for the property, out of which one-half of the sum due to the Gas Bank was to be paid, and the balance of the proceeds to be applied to the payment of J. Nash's note for \$10,000. But the consent of Charles Byrne and of the Gas Light Bank, does not appear to have ever been obtained.

It is, also, in evidence that the defendant received the rents of the property after the adjudication made to him, to the amount of \$351, which is a part of the damages claimed by the plaintiffs.

Under the facts and circumstances of the case, we think the court, *a qua*, erred. The mortgages with which the property was incumbered at the time of the adjudication to the defendant, exceeded by about ten thousand dollars, the amount of the purchase. They were not declared to the defendant, and nothing shows that he had any knowledge of the existence of those mortgages, when the property was adjudicated to him. The title, therefore, was not a safe and unincumbered one; and it is clear, that the danger in which he stood of being evicted by actions of mortgage on the part of the creditors, whose consent to the sale was not obtained,

was, of itself, a sufficient cause or excuse not only for withholding the price, if the incumbrances had been discovered after the perfecting of the contract of sale, but even for not complying with the conditions of the sale, and refusing to receive the transfer of the property. In the case of *Noe v. Taylor*, 11 La. 556, which presented a question very similar in its nature to the present, we said that the seller is bound, previous to calling upon the vendee for a performance of the contract, to exhibit a valid and *unincumbered title*. Indeed, how could the vendor pretend to compel the purchaser to pay him the amount of the price, or to give him the endorsed notes required by the terms of the adjudication, when it is shown that the price itself is far from being sufficient to extinguish the incumbrances? In this case, at the very time of the last sale, the mortgages were still in existence; they were not raised; and, if, subsequently, arrangements were made with the creditors to disincumber the property, this is no reason why the defendant should be made liable to pay the difference of the two adjudications. The title being incumbered at the time of his purchase, he had a right to withdraw, and to decline completing the negotiation, until the mortgages were raised.

The defendant, however, had no right to receive the rents of the property to which he had acquired no title. He may have collected those rents on the supposition, that the plaintiffs would be subsequently enabled to give him a good and unincumbered title, and to complete the contract; but it was his duty, after the second adjudication, to pay back the amount received to the plaintiffs. This amount forms a part of the plaintiffs' demand; and, although the defendant is discharged from any liability to pay the difference of the two adjudications, he must be condemned to reimburse the amount of the rents by him collected.

It is, therefore, ordered and decreed, that the judgment of the District Court be annulled and reversed, and that the plaintiffs recover of the defendant, the sum of three hundred and fifty-one dollars, with legal interest per annum thereon, from judicial demand until paid, and the costs of the lower court, those in this court to be borne by the plaintiffs and appellees.

MARTIN GORDON v. HIS CREDITORS.

The appellant, a partner of the insolvent in a saw mill, was to manage the business, taking charge of the receipts and disbursements, and to be entitled to a certain portion of the profits after all expenses were deducted. The insolvent was to furnish the land, buildings, laborers, and necessary capital for the purchase of materials. The appellant claims, under art. 2157, § 1, 3, of the Civil Code, to be subrogated to the rights of certain mechanics and laborers employed on the mill whose claims had been paid by him. *Held*, that there was no subrogation; that the debts were paid by the appellant in the course of his administration of the partnership business; and that, as to the insolvent, any advances made by the appellant could give him only the privilege of a partner on the partnership property, entitling him to be paid out of its proceeds in preference to any individual creditor of the insolvent.

APPEAL from the Commercial Court of New Orleans, *Watts, J.*
F. B. Conrad, for the appellant.

T. Slidell, for the syndic.

MARTIN, J. Harper claims a privilege on the proceeds of a piece of property surrendered, on which the Merchant's Bank had a mortgage, under the following circumstances: In January, 1839, he became interested with the insolvent in a saw-mill, erected by the latter on the premises, under an agreement that the insolvent should furnish the land, buildings, slaves, and capital for the purchase of materials, and that he, the claimant, all expenses being deducted, should receive one-third of the profits for his services as manager, and for any services occasionally rendered by Merrick, his partner, as engineer. He was to have the charge of the receipts which were to pass through his hands, and their disbursement.

The agreement was broken up by the cession of the insolvent, in February, 1840.

The privilege was claimed on the ground, that Harper is subrogated to that of the engineers, watchmen, carpenters, wheelwrights, and others, on the mortgaged premises, which would have prevailed over that of the Bank, the subrogation to which is said to result from the payment he has made of their claims, he being a creditor of the insolvent, and having paid claims of other creditors which were superior to his own by reason of their privileges

Packwood v. Dorsey and others.

or mortgages; and, also, because being bound with and for the insolvent for the payment of those claims, he had an interest in discharging them. Civil Code, art. 2157; § 1, 3. His pretensions were disregarded, and he has appealed.

It appears to us that the Judge, *a quo*, has correctly considered that Harper did not enter into any obligation to pay these claims out of his own money, but rather out of the avails of the mill, or the partnership funds, at first; though he was certainly personally liable to the claimants, after the partnership funds proved insufficient; that, as between Harper and Gordon, the former was only bound to pay the claims out of the receipts of the mill; that being the manager of it, and participating in its profits, he became bound to those whom he employed; but that, as to Gordon, his advances would give him only the right or privilege which his relation as a partner gave him on the partnership property, before any individual creditor could touch any part of the common stock; and that, he cannot be permitted to select particular payments made by him, and claim a subrogation thereon; that they were paid by him in the course of his administration, and must be settled in the partnership account, with the privilege before stated.

Judgment affirmed.

SAMUEL PACKWOOD v. ELIZA H. DORSEY, and others, Heirs of Alice Packwood, deceased.

A donation *inter vivos* of real estate, made while the Code of 1808, was in force, is null and void, unless executed before a Notary Public, and two witnesses, and accepted in express terms by the donee during the life of the donor. Book III. tit. II. arts. 53, 54.

A donation *inter vivos* of real property, null for want of formalities prescribed by law, cannot be ratified by any confirmative act on the part of the donor; nor will the voluntary execution of the donation by the donor, prevent him from pleading its nullity. Code of 1808, Book III. tit. III. art. 239. But the confirmation, ratification, or voluntary execution of such a donation by the heirs or assigns of a donor, after his death, will render it binding on them. Ib. art. 240.

Contracts are solemn, or ordinary. As the latter depend for their validity on the ascertained will of the parties, the formalities prescribed in relation to them are only

Packwood v. Dorsey and others.

probationis causa, and may be supplied by confirmation or ratification ; while as to the former, the formalities required being *solemnitatis causa*, and essential to their validity and legal existence, cannot be supplied by any ratification, express or implied. Of this class are donations *inter vivos*.

APPEAL from the District Court of the First District, *Buchanan, J.*

MORPHY, J. This controversy has arisen in relation to the partition of the community of *acquêts*, which existed between Samuel Packwood and his late wife, Alice Packwood. One of the heirs of the deceased, Emily Packwood, died leaving two daughters, now married to James A. Gasquet and Julian Neville. They claim, as their property, a lot situated in Magazine Street, which has been inventoried as owned by the community, but which they aver belongs to the succession of their deceased mother, in virtue of a donation of it made to her by Samuel Packwood, their grand-father, and they pray that it be not included in the partition. The evidence which is adduced of this donation, is to be found in a letter of Samuel Packwood, to Greenberry Dorsey, then the husband of his daughter Emily, dated New London, the 1st of September, 1817 ; and it is shown, that from that time, she has always been in the possession and enjoyment of the property, thus given to her. As to the donation itself, it is clearly null and void, not having been passed before a Notary Public and two witnesses, as required by the Code of 1808, in force at the time it was made. Page 220, articles 53, 54. But the question is as to the effect of the donee's possession, and the voluntary execution of the donation on the part of Samuel Packwood. It is contended, and the inferior Judge has so decided, that the donor who has voluntarily executed a donation null for want of the formality required by law, cannot plead its nullity.

The opinion of the court below is based exclusively on the authority of Toullier, who, in commenting on articles of the Napoleon Code, identical with those of our late Civil Code, comes to the conclusion, that although the donor cannot, by any confirmative act, supply the defects of a donation, *inter vivos*, null in form, yet he can ratify it, and preclude himself from pleading its nullity, by voluntarily executing it. Toullier, Vol. 5, No. 173 and 189 ; 8 Vol. No. 526. Whatever may be our respect for

that eminent jurist, we cannot adopt his opinion. He seems to have lost sight of the well known distinction between *solemn* and *ordinary* contracts. As the latter depend, for their validity, on the ascertained will of the parties, the formalities prescribed in relation to them are only, *probationis causa*, and can be supplied by confirmation or ratification; while in the former, the formalities required are, *solemnitatis causa*, and cannot be supplied by ratification, express or implied. They are essential to the validity and legal existence of those contracts, which by reason of their importance, or for any other cause, have been made to depend on a strict observance of such formalities. Of this class of contracts, are donations *inter vivos*; being irrevocable, and tending to impoverish the family of the donor, they are not viewed by the law with a favorable eye, and have been subjected to certain forms and solemnities, which cannot be dispensed with under pain of nullity. They must be executed before a Notary Public and two witnesses, and must be accepted, in express terms, by the donee, during the lifetime of the donor. Code of 1808, arts. 53 and 54, p. 220. After thus prescribing the form in which donations, *inter vivos*, must be executed, the Code provides, Art. 239, p. 310, that "the donor cannot, by any confirmative act, supply the defects of a donation, *inter vivos*, null in form, it must be executed anew in legal form." This provision is to be found under the head of recognitive and confirmative acts, wherein the general rule is laid down, in relation to ordinary contracts or obligations, that the confirmation, ratification, or voluntary execution of them, involves a renunciation of the means and exceptions that might have been opposed. It is apparent that the law-giver intended to except donations, *inter vivos*, from the operation of this general rule, but only so far as the donor himself is concerned; for we find in the next article, that, after his death, his heirs and assigns can confirm or ratify the donation, expressly, or by a voluntary execution of it. Art. 240. The reason of this difference between the donor and his heirs, is obvious. If he could, by ratification, express or implied, render valid a donation null in point of form, he would be enabled to make a donation without observing any of the formalities required by law; while the heirs, by their ratification, make no donation.

Packwood v. Dorsey and others.

That of their ancestor being absolutely null, they had a right to plead such nullity ; by their ratification they renounce that right. *Unicuique licet juri in favorem suum introducto renunciare.* The doctrine of Toullier would lead to the preposterous conclusion that, while under the law no express confirmation or ratification can render valid a donation under private signature, it can be made so by the tacit ratification resulting from the voluntary execution of it by the donor. It would, moreover, render completely inoperative the positive provision of our law, that a donation, null for want of any of the requisite formalities, must be made anew in legal form. This provision alone, surely excludes the idea that a void donation can be rendered valid by any ratification, either express or tacit, on the part of the donor. After thus expressing our opinion on the point made in this case, we will simply refer to a host of learned commentators on the Napoleon Code, and some decisions of the French Courts, by which the opinion of Toullier has been condemned : see Deloincourt, 1 Vol. p. 238, notes 2 and 3. Grenier, *Traité des Donations*, 1 Vol. p. 206, No. 57 *ter*. Duranton, 8 Vol. p. 411, No. 389. Solon, *Traité des Nullités*, 2 Vol. Nos. 355 and 356. Merlin's *Repert.* 17 Vol. 603 and 604. Boileau, Rogron and Paillet's *Commentaries* on art. 1339 of the Napoleon Code. 23 Sirey 1 P. p. 41. Dalloz, 1825, Part 2, p. 76 and 1832, p. 39. Biret, *Traité des Nullités* 1 Vol. p. 357. But the question is not, *res nova*, even in this court. In 4 Mart. N. S. 464, and in 3 Robinson, 194, we held, that a donation of slaves, void for want of an estimate of them signed by the donor and donee, as required by article 48, p. 218 of the old Code, was not rendered valid by the tradition or delivery of the slaves. These cases were much stronger than the present ; in them, the donation was passed before a Notary Public, and two witnesses, and was duly accepted ; it was wanting only in the formality of the appraisalment required by law.

It is, therefore, ordered that the judgment of the District Court be reversed ; and it is ordered and decreed, that the lot in Magazine Street, between Poydras and Lafayette Streets, as described in the inventory of the estate of the late Alice Packwood, be, and it is hereby declared, to belong to the community of gains and *acquêts*, heretofore existing between her and the plaintiff, S. Pack

Succession of Erard.

wood ; and it is further ordered that this case be remanded for further proceedings in the partition prayed for, the appellees to pay the costs of both courts, so far as they relate to this controversy.

Lockett, Micou, and A. Hennen, for the appellant.

Roselius, for the defendants.

SUCCESSION OF NICHOLAS JOSEPH ERARD.

Where an owner of ground, an undertaker or builder by trade, borrows a sum of money for the purpose of building thereon, the amount to be advanced to him according to the progress of the work, executing a mortgage on the property improved to secure its re-payment, and employs workmen to construct the buildings under his own directions, the latter will, under art. 2743 of the Civil Code, be entitled to a privilege for the payment of their labor on the building constructed by them, entitling them to be paid in preference to the mortgage creditor. It is only where there is an undertaker interposed between the owner and his workmen, that arts. 2744 and 2745 of the Civil Code are applicable. Where workmen are employed by the proprietor himself, they are put on the same footing, and allowed the same privilege as an undertaker.

APPEAL from the Court of Probate of New Orleans, *Bermudez, J.*

Grima, for the appellants.

D. Seghers, for the opponents.

SIMON, J. By virtue of the 13th section of the charter of the Citizens Bank, Nicholas Joseph Erard, on the 26th of July, 1838, obtained from said Bank the loan of a sum not exceeding \$7200, for the purpose of building two houses on certain lots of ground belonging to the borrower, with the express agreement, that no part of said loan should be paid to him until the buildings should have been commenced, and should be progressing ; and then only to an amount not exceeding the value of the work actually done on the day of such payment, and so on, from time to time, as the buildings should progress. For the purpose of securing the reimbursement of the amount loaned, with all the interest accruing thereon, the borrower executed an act of mortgage in favor of the Citizens Bank, on several lots of ground described in the said

act ; which, containing such stipulations as the nature of the contract required in relation to the use of the money loaned, and to the payments to be made progressively, was duly recorded in the office of the Recorder of Mortgages.

It appears that Erard was an undertaker by trade ; and, therefore, as owner of the lots on which the houses were to be erected, he had only to employ workmen and laborers to work under his directions in the construction of the buildings, with the materials which he was to furnish. As owner of the property, and as his own undertaker, he had no need of making any special contract with any other undertaker, as he was himself perfectly competent to conduct and superintend the construction of the buildings, and to have them executed by workmen immediately employed by himself. Accordingly, he employed three workmen, (the opponents in this cause,) who went to work under his direction, on the 18th of August, 1838, and who, without any other assistance but that of their apprentices, *made the work*, as one of the witnesses says, *with their own hands*, and labored without interruption until the death of Erard, which took place on the 9th of April, 1839, when the work was stopped for want of materials.

In the mean time, payments were made to Erard by the Citizens Bank, on the report of their appraiser and superintendant of the buildings, to wit : one of \$2000, on the 29th of October, 1838, and another of \$4000, on the 1st of December following ; which sums were to be applied to the payment of the expenses, according to the value of the work, as specified in the contract. It further appears from the record, that the whole work done by the opponents, from the 18th of August, 1838, to the 9th of April, 1839, was worth seventeen hundred dollars, to wit : \$804 50, for the work done previous to the 1st of December, 1838, and \$965 50, for that done after that date. On the aggregate amount of which, \$940 50 only having been paid by the deceased to the opponents, there remains due a balance of \$829 50, for which the latter obtained a judgment against Erard's executors.

The evidence further shows, that after Erard's death, the two houses having remained unfinished until March, 1841, the two lots and buildings thereon erected, in the state in which they were at the time of the death of the deceased, were sold on said day by

Succession of Erard.

the Register of Wills, and purchased by the Citizens Bank: one of them for \$3000, and the other for \$3400. The Bank afterwards finished the buildings, the cost of which amounted to a further sum of \$2800.

It further appears that, on the 31st of August, 1841, the executors filed a tableau of distribution of the moneys belonging to Erard's succession, allowing to the Citizens Bank, after deducting their contribution to the general charges and privileges, the whole proceeds of the sale of the two lots and houses, and also the proceeds of a third lot of ground included in the act of mortgage. To this tableau, the three workmen filed their opposition, claiming a privilege on the value, or proceeds of the sale of the property, for the amount due them for their labor, from which said property had been benefited, and praying that a proportionate and relative estimation (*ventilation*) be made of said property, according to the 3235th art. of the Civil Code.

Accordingly, two experts were appointed by the court, *a qua*, and in October, 1841, they filed their report, which was homologated by consent of parties, and from which it results that, after deducting the amount of the expenses, (\$2800,) incurred for finishing the two houses, they were worth, (for the materials and workmanship,) in the condition in which they were at the time of the probate sale, the sum of \$4207 52; and that the proportion to which the opponents were entitled out of the price for which they were sold, amounted to \$824 20. Thus, it appears that the payments made by the Bank under the contract, exceeded the value of the work and materials, so far as it had then progressed, by about \$1800, to which may perhaps be added a further sum of \$965 50, which is the amount of the work done upon the buildings between the date of the last payment, and that of the borrower's death. It seems, therefore, well established, that the whole amount paid by the Bank on the first of December, 1838, was not due at that time under the contract; and that if the payment had been made in the real proportion provided for by said contract, the proceeds of the sale would perhaps have been sufficient to cover and satisfy, both the claim of the Bank, and the privilege of the opponents.

The inferior court took the report of the experts, and the state-

ment made thereon, as the basis of its opinion, and accordingly ordered the tableau of distribution to be amended in conformity with the same, allowing to the parties their respective proportions of the price. From this judgment the Citizens Bank has appealed.

This case is peculiar in its nature; and although we are not ready to assimilate the legal position of the parties to this controversy, and the rights resulting therefrom, to those of persons whose contract is, on the one hand, that of an undertaker, who obligates himself to construct a house for another, and on the other hand, that of a proprietor, who is bound to pay the amount of the price of the building, according to the stipulations contained in the contract, we think that the conclusion to which the Judge, *a quo*, has arrived, is correct, and that the opponents are entitled to recover the amount to them allowed in the amended tableau of distribution. Erard, though an undertaker by trade, cannot be considered as such in relation to the Citizens Bank, nor with regard to the workmen by him employed. He was the owner of certain lots which he wished to improve, and a borrower of money from the Citizens Bank, in whose favor he consented to, and executed a mortgage on the property which he possessed, for the purpose of securing the re-payment of the sum loaned. The stipulation contained in the act of mortgage was inserted in conformity with the 13th section of the charter of the Bank, and with a view to apply the funds borrowed to increasing the value of the property, and thereby to obtain a greater security for the reimbursement of the sum, to secure which, the value of the property mortgaged was originally inadequate and insufficient. But the Bank was not the owner of the lots. Its money was only loaned upon the conditions imposed by the contract; and, if so, it was perhaps the duty of the Bank to ascertain that the funds proceeding from the loan were used for, or applied to the object for which it was intended. However this may be, Erard was the owner, and as such, he had a right to employ workmen to construct his buildings under his direction. There was no undertaker between him and his workmen, and it is only, in the latter case, that the rule pointed out by arts. 2744 and 2745 of the Civil Code, can properly apply.

Art. 2743 of that Code provides, that "*workmen employed im-*

 Succession of Erard.

mediately by the owner in the construction of any building, have a privilege for the payment of their labor thereon." This is the same privilege which the same law grants to undertakers; and it is obvious, that the intention of the law maker was, to establish a distinction between the exercise of the rights of workmen, when they are employed by the owner, and the manner in which they should be enforced when their work has been done under the direction of an undertaker; that is to say, to provide for the case in which workmen, employed immediately by a proprietor, in the absence of an undertaker, should have to exercise their legal rights against the former, for the recovery of the price of their manual labor. In such case they are put on the same footing with undertakers, and are allowed the same kind of privilege. It matters not whether the payments made by the Bank, were made to the owner in anticipation or not. The privilege exists with the same force as that of an undertaker; it may be exercised in the same manner; and it does not lie in the mouth of the mortgage creditors to say that the opponents are deprived of their remedy or right of recovery, because the institution thought proper to advance to the owner of the property improved, a larger amount than the property, in its unfinished state, was able to secure. Under the privilege allowed by law to the opponents, the proportionate estimation (*ventilation*) ordered, by the inferior, tribunal was properly made; and we are unable to see any reason why, on this point, the judgment rendered thereon should be disturbed.

But it has been insisted, that the opponents are not entitled to any privilege, because their contract was not reduced to writing, and recorded as required by art. 2746 of the Civil Code, which provides, that "*no agreement or undertaking (tout devis ou marché) for work exceeding five hundred dollars, which has not been reduced to writing, and registered with the Recorder of Mortgages, shall enjoy the privilege above granted.*" This law seems to apply specially to such agreements or undertakings for work as may be reduced to writing; such work, for instance, as is undertaken by the job. But, in this case, the amount claimed by the three opponents does not exceed, for each of them, the sum of \$500; and if it did, we are not prepared to say, that the law relied on should govern the rights of workmen, or laborers, who are employed by

the day or week, and who are to be paid by the owner every day, or every week, as the work progresses. Indeed, such workmen or laborers are generally called on and retained to furnish their manual and daily labors ; they have nothing to do with any contract for building, and they follow the instructions of the undertaker, or those of the owner, when employed immediately by him. The time during which their employment is to last is generally unknown ; they may be dismissed at the will or pleasure of their employers ; and it would be a strange doctrine to require them to reduce to writing, and to record a statement of the number of days, or of weeks, (generally unknown,) during which they may be employed to work under the directions of the owner or of the undertaker. This, in our opinion, cannot be the object of the law ; and from the terms of the article above quoted, and of the 2339th and 2340th articles of the same Code, we are rather inclined to think that they are applicable to another class of workmen--to those who are employed by virtue of a contract, or to work by the job, or for a fixed price ; and that they have no bearing upon those who, being employed immediately by the owner to work, by the day, or by the week, are to be paid by him as the work progresses.

Furthermore, how could this objection avail the Bank, which was well aware when the contract of mortgage was executed, that, although the borrower was an undertaker by trade, he could not construct his buildings without workmen or laborers ? Surely, the Bank could not expect that, if the sums advanced to the owner were not applied to the object of the contract, by paying the daily or weekly salaries of the workmen immediately employed by him to carry it into execution, the latter should be deprived of the privileged rights to them granted by art. 2743 of the Civil Code. As we have already said, this kind of privilege exists in contradistinction with the rights allowed to those who are employed by undertakers, and who are protected by the provisions of arts. 2744 and 2745 of the same Code ; and under the circumstances it must be enforced, whether recorded or not.

Judgment affirmed.

WILLIAM NELSON v. JAMES R. CONNER and others.

Plaintiff having a judgment against defendants as commercial partners, seized under a *fi. fa.* a judgment obtained in a court of original jurisdiction by two of the partners against the third in an action for a settlement of the partnership. One of the partners, who had been appointed a receiver in the last suit, having, as receiver, enjoined the *fi. fa.*, deposited a sum of money in court to represent the bond and surety required for the injunction. The judgment seized being reversed on appeal, the injunction was discontinued without objection on the part of the plaintiff, who, under a second *fi. fa.* seized the money deposited in court, and took a rule on the defendants to show cause why it should not be paid to him towards the satisfaction of his execution. *Held*, that the rule should be discharged; that, had a bond been executed, it ought to have been signed by the party as receiver; that the deposit was in lieu of it; that, unless the contrary be shown, it must be presumed that the money deposited was in the parties hands as receiver; that, as such, he was an officer of the court below, in the nature of a judicial sequestrator, and bound to account to it for all the funds coming into his hands; and that the court from which the *fi. fa.* was issued, had no power to withdraw the funds from the control of the court in whose custody they were.

APPEAL from the Commercial Court of New Orleans, *Watts, J. Elmore* and *W. W. King*, for the appellant.

Bonford and *Roselius*, contra.

SIMON, J. The record discloses the following facts. The plaintiff, having obtained a judgment against the defendants as commercial partners, an execution was issued thereon, which was levied upon a certain judgment obtained in the District Court by Whitehead and Gridley, against their co-partner and co-defendant, Conner. After this seizure was made, Whitehead, as receiver of the firm of Conner, Gridley & Co., under the appointment of the District Court, as well as in his individual capacity, applied for a writ of injunction to prevent the sale of said judgment; and as he represented himself unable to give the security required by law, the Judge in granting the writ, required that, instead of giving his bond with the usual surety, he should deposit with the Clerk of the court the sum of seven hundred dollars, to represent the bond and security which he was bound to furnish. The judgment seized was subsequently reversed by the Supreme Court; whereupon, Whitehead discontinued his injunction suit, without any objection on the part of the plaintiff's coun-

sel in the first suit ; and the order of dismissal was accordingly granted and entered. After this proceeding, a new execution was issued, which was levied upon the amount deposited with the Clerk, as having been so deposited by Whitehead ; whereupon a rule was taken by the plaintiff on the Clerk of the Court, *a qua*, and on said Whitehead, and M. & B. Mullen & Co., who are stated to have an interest in the question, to show cause why said sum should not be paid to the plaintiff in part satisfaction of his execution. This rule was served on the 20th of June, 1843, and on the 26th of the same month, the execution, by virtue of which the seizure had been made, was returned by the Sheriff stating that no part of the sum seized had come to his hands, and that no other property had been found. In the meantime the rule was tried, and the Judge, *a quo*, being of opinion that the money in controversy could not be legally seized, overruled the plaintiff's motion, from which judgment the latter appealed.

The record shows, it is true, that the injunction suit in which the amount seized was required to be deposited, was originally instituted by Whitehead acting as receiver in the matter of *Whitehead & Gridley v. J. R. Conner*, as well as in his individual capacity ; but the proceedings had in the said suit show, that the same was really brought and conducted throughout by Whitehead, for the benefit of the parties concerned in the suit in which he was appointed receiver, and in compliance with the obligations by him contracted as such, under the appointment of the District Court. His individual interest therein did not extend further than as one of the firm for whose benefit he was acting as receiver ; and it is obvious from the object of the injunction suit, and from the proceedings had therein, that if he, Whitehead, had been able to furnish the bond required by law, it ought to have been signed by him in his capacity of receiver, as given for the purpose of obtaining the injunction, which he states, was necessary for the protection of *the rights of all concerned*. The amount deposited by him stood in lieu of the bond ; and, until the contrary appears, we must presume that the money deposited was in his hands as receiver, and that it was so used by him in the exercise of his functions, and in due course of his administration of the concerns,

under the appointment of the court before which he is bound to render his account.

With this view of the capacity in which Whitehead acted, when he deposited the money in controversy, we concur with the Judge, *a quo*, in the opinion that, as receiver, Whitehead was an officer of the District Court, in the nature of a judicial sequestrator, and bound to account before that court for all the funds which may have come to his hands as such, and which may be subject to distribution and payment of costs and privileged debts in that court. If so, how could the Commercial Court dispose of a fund which is in the keeping and custody of another tribunal? What authority would the court, *a quo*, have to withdraw the amount seized from the mass of the funds under the control of the District Court? None whatever; and such a proceeding would have the effect not only of creating great confusion among the legal pretensions of the parties concerned, but also of injuring the rights of those who are not parties to this suit. This cannot be permitted, particularly as it would be interfering with a matter belonging to another jurisdiction; and as it would, perhaps, prevent the receiver from complying with the exigencies and obligations of the bond, which he must have given to the court by which he was appointed.

But another proposition has been urged by the plaintiff's counsel, to wit, that if it be true, that the money seized was the property of Conner, Gridley & Co., and came into Whitehead's possession, as receiver, it may be seized on an execution against Conner, Gridley & Co. This might, perhaps, be true, if the execution was levied on the funds in the hands of the receiver, and the proceedings carried on contradictorily with all the parties concerned before the court under whose appointment such funds were received. But we must abstain from expressing any opinion on this point, as all the parties interested therein, are not before us, and as, for the reasons already adduced, the funds seized cannot be withdrawn in this manner from the possession of the receiver, and must go back to, and be replaced under the control of the District Court. Certain it is, that if the money seized must, or may be applied ultimately to the satisfaction of the judgment obtained

Davock v. Darcy.

by the plaintiff against Conner, Gridley & Co., the court, *a qua*, has, in our opinion, no authority to order it.

Another serious question might, perhaps, have been raised from the fact disclosed by the record, that the execution, by virtue of which the money in controversy was seized in the hands of the Clerk, was returned by the Sheriff immediately after the judgment appealed from was rendered, stating that no part of the sum seized had come to his hands, and that no other property was found. This return was made before the application of the plaintiff for an appeal from the judgment discharging the rule, and might, perhaps, be considered as an acquiescence in the judgment appealed from, as, after said return, the Sheriff had no further authority to receive the money seized from the Clerk, if our judgment was in favor of the plaintiff; and as, in consequence of said return, said plaintiff was at liberty to issue another execution and seize other property. Whatever may be the legal consequence of this unadvised and preposterous return, it is at least irregular, as only one month and eleven days had run out; and although we are not called upon to express any opinion on this point, which it is unnecessary for us to examine, we have thought proper to notice it, in order that parties litigant, or their counsel, may henceforth be more watchful over the acts of the officers by them employed, and thereby avoid, if not the loss of their rights, at least a new subject of further litigation.

Judgment affirmed.

MICHAEL E. DAVOCK v. JAMES DARCY.

A wife may obtain a separation of property, though she brought no dowry in marriage, and have no actual rights or claims against her husband, which can be endangered by the disorder of his affairs, where the habits or circumstances of her husband render it necessary to preserve for her family the earnings she may afterwards derive from her industry or talents. Her right to a separation is not limited to the cases mentioned in art. 2399 of the Civil Code.

Davock v. Darcy.

APPEAL from the Parish Court of New Orleans, *Maurian, J. Barthe*, for the appellant.

Redmond and Budd, contra.

MORPHY, J. The plaintiff, having obtained a judgment, levied his execution on the contents of a hat and clothing store in Chartres street, as belonging to the defendant. The wife of the latter, Jane Darcy, filed an opposition, claiming the goods seized as her individual and separate property. The evidence shows, that on the 10th of August, 1841, the opponent, by a decree of the District Court, was separated in property from her husband, who had failed some time before, and that her separation was duly advertised according to law. From this decree she appears to have brought no dowry in marriage, and to have had no rights or claims against the defendant. The evidence further shows, that at the time of the levy, and long before, she was in the occupancy of the store, which was rented by her; that the goods seized were purchased and paid for by her after the judgment of separation, and were insured in her name; that she is a person of remarkable industry as a seamstress; and that she manufactured herself, and supplied the store with all the ready made clothing sold in it, and that she carried on business in her name as a retailer, although the defendant was about the store, and attended with her to the management of it. Under these facts, the Judge below sustained the opposition of Jane Darcy, and set aside the seizure; whereupon, the plaintiff appealed.

It is contended, on the part of the appellant, that the judgment of separation relied on, is, on its face, null and void; as it shows none of the circumstances which, under article 2399 of the Civil Code, authorize a judicial separation between husband and wife; in other words, that a wife who has brought no dowry, and has no rights and claims to exercise against her husband, cannot obtain a separation of property. Even admitting that the appellant can, in this way, attack the validity of a judgment of separation rendered by a court of competent jurisdiction, which may well be questioned, it appears to us that the ground he has taken cannot avail him. It is true, that in the article referred to, the danger the wife is in of losing her dowry from the mismanagement of her husband, or the belief created by the disorder of his

Davock v. Darcy.

affairs that his estate may not be sufficient to meet her rights and claims, are mentioned as the causes which authorize her to pray for a separation of property; but it does not necessarily follow that she can, in no case, obtain a separation of property, because she brought no dowry, or had no actual claims against her husband which may be endangered. A wife who has brought no money in marriage, may bring that which is more than an equivalent for it. She may be a good teacher of music; a milliner, or possess some other art, or industry, whereby she can make large earnings for the support of her family. If the husband of such a woman is a spendthrift, or an imprudent man, all her gains, which would belong to the community, might be squandered away by him, or be seized by his creditors. Although in such a case, the wife have brought no dowry, she has an interest as strong as if she had brought one, in being separated from her husband, and in putting an end to the community, in order to preserve for her family, the future earnings or gains she may derive from her industry or talents. The object of a separation of property is twofold: it provides for the present, by enabling the wife to recover her dowry, or other claims against her husband; and it provides for the future, by putting an end to the community, and thus securing to the wife her individual acquisitions, or gains thereafter, in whatever manner obtained. It would be giving to the article of the Code too narrow a construction, to limit the wife's right to a separation to the cases therein enumerated, because they are the most ordinary ones. Pothier, *De la Communauté*, Vol. 2, No. 501. Toullier, Vol. 13, p. 48, No. 28. 8 Duranton, Brussels' edit. p. 192, No. 404. We conclude then, that although a woman has brought no dowry, and has no actual claims against her husband, she is not absolutely precluded from the right of obtaining a separation of property. As we have not before us the evidence on which the decree of separation was based, we will presume that it was rendered upon a proper and sufficient showing.

Judgment affirmed.

FRANÇOIS GOUBEAU v. THE NEW ORLEANS AND NASHVILLE
RAIL ROAD COMPANY.

Where the return on a *fi. fa.* states, that it was levied on the proceeds of the sale of certain slaves seized and advertised to be sold at a future day, at the suit of another party, the plaintiff in the execution will acquire no privilege entitling him to be paid by preference, out of the proceeds. *Per Curiam.* The slaves themselves were not seized, and the proceeds of the sale were not in existence at the time; and could not, therefore, be taken possession of. To entitle a seizing creditor to the privilege conferred by arts. 722, 723 of the Code of Practice, the thing seized must be taken possession of by the officer; otherwise, there is no seizure.

APPEAL from the District Court of the First District, *Buchanan, J.*

Schmidt, for the plaintiff.

Preston, for the appellants.

SIMON, J. By virtue of a judgment obtained by the plaintiff against the defendants, an execution was sued out, which he caused to be levied on the 20th of July, 1842, as stated in the sheriff's return, "*on the proceeds of the sale of five slaves, which were seized and advertised to be sold on the 20th of August, 1842, with other property of the defendants, at the suit of the State of Louisiana and which slaves were sold on the said day.*" On the 30th of the same month, Painter, Richardson, Layton's executors and Gosselin, levied on the same proceeds, by virtue of executions issued subsequent to that of the plaintiff, and on the third of August, the said individuals caused their judgments to be recorded at the mortgage office, thereby acquiring a judicial mortgage on the property seized, which mortgage is recited in the certificate of mortgages produced and read by the Sheriff on the day of the sale.

The sale, under the seizure of the State, was effected on the 20th of August, and afterwards, the Sheriff having called upon the mortgage creditors to show cause why their mortgages, subsequent to that of the State, should not be cancelled, it was determined by this court, that the State had neither mortgage, privilege, nor lien on the five slaves, and that the mortgages of Painter, Richardson, Gosselin and Layton's executors had a prefer-

ence on the proceeds thereof, by virtue of their judicial mortgages, over the claim of the State. See case of *The State v. The New Orleans and Nashville Rail Road Company*, 4 Robinson, 231. The plaintiff in this suit was no party to the said controversy.

The present controversy grows out of a rule taken by the plaintiff on John L. Thielen, late Sheriff of the District Court, who held in his hands the funds produced by the sale of the five slaves, to show cause why he should not pay and satisfy the amount of the plaintiff's judgment, to wit, the sum of \$2952, with interest and costs, according to the *fi. fa.*, by virtue of which said slaves were seized, on the 20th of July, 1842.

Thielen answered to the rule, and after stating the extent of the pretensions set up to the said proceeds by the State and Layton's executors, Painter, Richardson, and Gosselin, prays that they be made parties to the rule; and that, after hearing all the parties interested, the court make such order as may relieve him, the Sheriff, from all responsibility in the premises.

This was done; and after issue joined by those persons and by the State, denying that the plaintiff has any claim on the funds in dispute, and after a full investigation of the rights set up by all the parties respectively, the court, *a qua*, decided that Goubeau was entitled to be paid in preference to the opponents, and from this judgment, Layton's executors, Painter, Richardson and Gosselin took the present appeal.

The only question presented to our solution in this case is, whether the appellee by his seizure of the proceeds of the sale of five slaves, which had been previously seized by the Sheriff at the suit of the State, and which were to be sold at a future period, acquired any such privilege upon said proceeds, as to give him a right to be paid out of the proceeds in preference to the appellants, who, previous to the sale, had acquired a judicial mortgage on the property?

To this it is answered by the appellants' counsel, that the appellee acquired no privilege *on the proceeds of said slaves*, because *he did not seize them*, but only any proceeds that might be made under the seizure by the State. Hence, it is insisted, that Goubeau acquired nothing previous to the recording of the ap-

Goubeau v. The New Orleans and Nashville Rail Road Company.

pellants' judgment, as the proceeds were not then in existence, as the Sheriff had nothing in his hands for the benefit of Goubeau, and as, at the time that his seizure of the proceeds could have been effectually made, to wit, after the sale of the slaves, said slaves were subject to the appellants' judicial mortgage.

The law relied on by the appellee's counsel, art. 722, and 723, of the Code of Practice, provides, that "the creditor, *by the mere act of seizure*, is invested with a privilege on the property thus seized, which entitles him to a preference over other creditors; and when several successive seizures are made of the same property, the creditors making them, are entitled to a preference according to the order of their seizures." Thus, it is clear that, if the Sheriff's proceeding in Goubeau's case, was a *seizure* in the true sense of the law, he must be entitled to his privilege, and be paid by preference over the subsequent seizing creditors, and even over the judicial mortgages subsequently acquired, as the appellants could not, by the subsequent recording of their judgments, in any manner defeat or affect the right previously acquired by the appellee.

Now, what is a seizure? Bouvier's Dict. vol. 2, says: "*seizure* is defined to be *the act of taking possession of the property* of a person condemned by the judgment of a competent tribunal, to pay a certain sum of money, by a Sheriff or other officer, lawfully authorized thereto by virtue of an execution, for the purpose of having such property sold according to law, to satisfy the judgment." Dalloz, Verbo *Saisie, Exécution*, says: *La saisie, exécution, ou mobilière, ou générale, est celle par laquelle un créancier met sous la main de la justice les meubles saisissables de son débiteur, afin de les faire vendre pour obtenir son paiement sur le prix.*" And further, Verbo *Saisie Immobilière*, he proceeds; "*Le but de l'une et de l'autre* (both kinds of seizures) *est de mettre les biens du débiteur entre les mains de la justice, pour les faire vendre, et payer les créanciers sur le prix.*" There must be, therefore, an act of taking possession of the property; the thing seized must be put in the hands of the officer; otherwise, the seizure is incomplete, or rather, there is no seizure. So, by the 659th art. of the Code of Practice, when the objects seized consist in money, &c., or slaves, the

Sheriff *should put them in a place of safety*. So, by art. 661, until the sale, the Sheriff is authorized to make such disbursements as are necessary *for the preservation of the property seized*; and by art. 662, if the objects seized be animals or slaves, "he cannot lease or hire them out, unless authorized by the court, with the consent of both parties." So, by art. 667, and the following, the Sheriff must give notice to the debtor of the property seized from him; must have said property advertised for sale; must have it estimated by experts, after due notice to the debtor; and finally, the rights and claims which the debtor has to the thing seized, are transferred to the purchaser by the mere effect of the adjudication, and said purchaser can take immediate possession of the property thus adjudicated. See the case of *Winn v. Elgee*, *ante*, 100.

From all the different provisions of our laws above referred to, can it be controverted that, in order to have them carried into effect, the Sheriff must necessarily take the property seized into his possession? This is of the essence of the seizure. It cannot exist without such possession. The property would not be seized as the law directs; and we doubt very much, if a defendant in execution should sell a slave against which a Sheriff had an execution, when he had left the slave in the hands of the defendant, without having previously taken the slave in his own possession, whether such sale could be successfully attacked and invalidated. The five slaves, upon the proceeds of the sale of whom the appellee claims to exercise his privilege, never were seized for his benefit. They were clearly subject to the appellants' judicial mortgage on the day of the sale; and this mortgage must, in our opinion, have its full effect upon the slaves, or upon their proceeds, to the exclusion of the privilege set up by Goubeau, the appellee.

The same reasoning applies to the seizure of the proceeds of the sale, upon which the privilege is sought to be exercised. Those proceeds were not in existence at the time of the alleged seizure, and could not, therefore, be taken possession of by the Sheriff. The seizure of such proceeds was merely prospective in its operation, and could have no effect until they came to the hands, or possession of the officer. But suppose the sale never to have taken place—suppose the debtor, on being notified of the seizure

Shepherd and another v. The Third Municipality of New Orleans.

made by the State, had paid the debt, would the appellee have acquired any right under his seizure? Certainly not. His rights, if he had any, would have vanished; and he would have been obliged to renew his seizure upon the slaves themselves, and if so, to seize and sell them subject to the judicial mortgage previously acquired by the appellants.

It is, therefore, ordered, that the judgment of the District Court, be annulled, and reversed; and that the rule obtained by the plaintiff and appellee in the court below, be discharged, with the costs in both courts.

JAMES H. SHEPHERD and another v. THE THIRD MUNICIPALITY
OF THE CITY OF NEW ORLEANS.

The streets of a city, and the banks of a river on which it is built, are *loci publici*, and the municipal authorities are bound to see that the use of them by the public, is not obstructed. They cannot allow any erection thereon which may render their use incommodious; and, though they may tolerate, temporarily, works not deemed injurious to the rights of the public, no permission of a Council can prevent a subsequent Council from putting an end to such toleration. As where works have been permitted to be erected across the street and the bank, for the purpose of conveying timber to saw-mills built on lots fronting on the river, the municipal authorities may order such works to be removed, no one having a right to a permanent occupancy of the banks of a river.

The erection of wharves before the city of New Orleans and its suburbs, at such places as commerce may require, is a legitimate exercise of power by the Council of any of its Municipalities.

APPEAL from the Parish Court of New Orleans, *Maurian, J.*

Preston and Roselius, for the appellants.

Canon and Mazureau, for the defendants.

MARTIN, J. The plaintiffs are appellants from a judgment which refuses them damages for an injury, which they contend they have sustained, in consequence of the Corporation having caused wharves and other works to be erected on the bank of the Mississippi, opposite to their lots, on which they had constructed, at great expense, valuable saw mills, from which they derived

great profit, by the erection of which works, they have been disabled from availing themselves of their mills, which they had put up with the consent and permission of the municipal authorities.

The mills having been built on lots of the plaintiffs, fronting on the river, but separated from it by a street, no consent or permission was needed or given by the municipal officers, for their erection; but the City Council permitted certain works to be made across the street, and the bank of the river, to the water, to facilitate the bringing of timber to the mills. The street and the banks of the river are "*loci publici*"—out of commerce, and the municipal authorities are bound to see that the use of them by the public be not obstructed; but they have no power to allow any erection thereon which may render their use inconvenient. They may, indeed, temporarily tolerate works thereon, which they may deem not injurious to the rights of the public; but no permission of a Council can prevent a subsequent Council from putting an end to such toleration. The plaintiffs do not complain of the positive destruction of any part of their property, but only of the exercise of the right by the Municipality, or rather of its compliance with its duty, to facilitate commerce, by the erection of new wharves in parts of the port where the extension of business in its opinion, demanded them. The plaintiffs' and appellants' counsel has urged, that his clients have, in common with every inhabitant or stranger, the free use of the banks of the Mississippi, and that the Municipality cannot prevent any person from using these banks. While they exercise a right which they have in common with others, no one can impede or obstruct their use of the banks while there is, close by the part which they occupy, a sufficient space left for others. The counsel have told us, that a part of the bank, in the use of which the defendants have disturbed them, does not extend above sixty feet, the one-half of the front of the lots on which they have erected their mills. No one has a right to a permanent occupancy of the banks of a river. The planter may land his crop thereon, but he must remove it. He cannot leave it there until he has found a purchaser. The fisherman may, with a few boards, erect a temporary hut, in which he may shelter himself during the storm; but he cannot erect any permanent building. The municipal authorities employ offi-

Bourgerol v. Allard and another.

cers whose duty it is to see that merchandize landed, or to be shipped, does not encumber the banks of the river, any longer than is strictly needed.

It appears to us, that the erection of wharves before the city of New Orleans and its suburbs, at such places as commerce may require, is a legitimate exercise of power in the Council of either of the Municipalities. 3 Mart. N. S., 140.

Judgment affirmed.

JEAN ANTOINE BOURGEROL v. LOUIS ALLARD and another.

In an ordinary partnership, formed for a particular purpose, neither of the parties can bind the other unless authorized to do so, specially, or by the articles of partnership. C. C. 2843.

In every suit on a joint contract, all the obligors must be made defendants, though some may have paid their proportion of the debt ; and no judgment can be obtained against any, unless it be proved that all joined in the obligation, or are by law presumed to have done so. C. C. 2080.

Where it is not proved that one of the defendants in an action to enforce a joint obligation, ever entered into it, there must be a judgment as in case of nonsuit.

APPEAL from the Commercial Court of New Orleans, *Watts, J.*

MARTIN J. The defendants are appellants from a judgment, by which the plaintiff has recovered \$1200, one-half of the price which Soulé undertook to pay him for making a plan of a plantation, the joint property of himself, Merle, and the two defendants. The claim was resisted on the plea of the general issue, and on the ground that, admitting that Soulé employed the plaintiff, the plan was so unskillfully made, and the execution of it so long delayed, that it was absolutely useless to the defendants.

Their counsel, in this court, has denied that Soulé had any authority to bind the defendants to the plaintiff. The latter has shown that, in a sale made by the defendants to Soulé and Merle, of one-half of the plantation, there is a clause by which the parties agreed, with a view of selling it in lots, that a plan should be made, at the common expense of the parties ; that Soulé engaged

the plaintiff for this purpose, and promised to pay him \$2400; that during the time the plaintiff was engaged in making the survey and plan, the defendant, Allard, frequently called on him, to induce him to hasten his operations; and that, after the plan was completed, Soulé and Merle paid the plaintiff \$600 each. The counsel for the defendants has urged, that neither of them had any knowledge of the nature of the contract which Soulé made with the plaintiff; that, therefore, they are not bound to pay the price agreed upon by Soulé and the plaintiff, and that there is no evidence of the value of the work done.

In the sale from the two defendants to Soulé and Merle, there is a clause for the confection of a plan at the expense of the parties. It is in evidence, that Allard hurried the plaintiff's operation. He must, therefore, be bound to compensate him. It does not appear from the testimony, that there was any engagement for a fixed price before the work was begun, or until it was completed. At the time, therefore, that Allard hurried the completion of the plan, he did not assent to the payment of any fixed sum for it; and no subsequent agreement between the plaintiff and Soulé was binding on Allard without his intervention therein, or his subsequent approbation. Soulé informs us, on his cross-examination, that he "is not positive whether the price was agreed upon before the bill was brought in;" but Allard must be bound by the uncontradicted depositions of several witnesses, to wit: D'Hebicourt, Buisson, Bringier and Pilié, who estimate the work of the plaintiff at \$2400.

There is not a tittle of testimony in regard to the defendant Robert; but we find evidence in a document recorded in a notary's office, that she agreed with her co-defendant, and with Soulé & Merle, that a plan should be made of the plantation, at their joint expense. She certainly thereby entered with them into a partnership, for the confection of a plan. This partnership was an ordinary one, for it was not commercial; Civil Code, art. 2797; and a particular one, for it was confined to a single operation. *Ib.* In such a partnership, neither of the partners can bind one or more of the others, unless he or they have given him powers so to do, either specially, or by the articles of partnership; Civil Code, art. 2843. In the present case nothing shows any power,

special, or by the articles of the partnership, from the defendant Robert to Allard, Soulé or Merle. She pleaded the general issue, and the plaintiff was, therefore, bound to make out, by legal proof, every fact necessary to establish his claim against her, *i. e.* a contract in which she intervened, personally, or by a person authorized to bind her.

The obligation sued upon is a joint one ; for the plaintiff claimed under it \$2400, from Soulé, Merle, Allard and Robert, the two first of whom have paid him each one-fourth, and the other two-fourths are claimed, one from each of the defendants ; Civil Code, art. 2075. In every suit on a joint contract, all the obligors must be made defendants ; and no judgment can be obtained against any, unless it be proved that all joined in the obligation, or are by law presumed to have done so. *Ib.* art. 2080. Soulé and Merle, although they had paid each their fourth part, ought to have been made defendants in the present suit ; but no exception was made on this point, nor was it urged in argument below, or before us, and we do not notice it because the conclusion we have come to, on another point, renders it unnecessary. We think, however, that the First Judge erred, in giving judgment for the plaintiff, as as it was not proved that the defendant Robert, against whom a joint obligation is sought to be enforced, ever entered into it.

In the case of *Thompson v. Chretien et al.*, determined at Opelousas in September, 1842, 3 Robinson, 26, we reversed the plaintiff's judgment against one defendant in a joint action, because his co-defendant's exception on the score of commorancy, had been sustained, and the plaintiff had neglected to appeal from the judgment dismissing him.

It is therefore ordered, that the judgment be annulled and reversed, and that there be judgment for the defendants as in the case of a nonsuit ; the plaintiff paying costs, in both courts.

Buscail, for the plaintiff.

Denis, for the appellants.

ELISHA CROCKER, Syndic of the creditors of Warner Watson
Stewart, an Insolvent, v. GEORGE W. TURNSTALL.

Under art 351 of the Code of Practice, a party to an action to whom interrogatories are propounded can be required to answer, in open court, only when he resides in the parish where the court sits. Where his residence is out of the parish, but within the State, it is the duty of the party propounding the interrogatories to obtain from the court a commission directed to some Judge, or Justice of the Peace in the parish in which the party interrogated resides, to receive his answers; or the interrogatories, if unanswered, cannot be taken *pro confesso*. C. P. 352.

A plaintiff may discontinue his action, at any time before judgment has been rendered, on paying the costs. C. P. 491. But he has no right to call upon the court for a judgment of nonsuit. As a general rule, when the plaintiff does not make out his case, the judgment against him should be one of nonsuit; but there are circumstances which render this rule inapplicable, and which ought to be considered sufficient to put an end to the matter in litigation. Such circumstances, growing out of the evidence, are to be left to the sound and legal discretion of the court, without any interference on the part of the parties.

APPEAL from the District Court of the First District, Buchanan, J.

Elwyn, for the appellant.

McKinney, for the defendant.

SIMON, J. The plaintiff, in his capacity of syndic of the insolvent estate of W. W. Stewart, seeks to revoke and annul a sale of certain property made by the insolvent to the defendant, on the grounds, that the sale was made in fraud of the insolvent's creditors; that the insolvent was, at the time, in failing circumstances; and that within three months from the day on which the act of sale was passed, he filed his petition and schedule for the benefit of the insolvent laws of the State.

To this petition the defendant answered by pleading the general issue. Several months after the filing of this answer, the plaintiff obtained leave to file a supplemental petition, in which he propounded to the defendant certain interrogatories, which he prayed that the defendant might be ordered to answer *in open court*, on the day of the trial of the cause; which order was granted accordingly.

On the trial of this case in the court below, the plaintiff, after having introduced in evidence the documents annexed to his pe-

tion, called upon the defendant for his answers to the interrogatories contained in the supplemental petition; but the defendant's counsel stated, that his client was not in court, and did not intend answering the interrogatories; whereupon the plaintiff's counsel moved the court, *a qua*, to allow him to take the facts inquired of *pro confessis*, which, on the objections of the defendant's counsel, was refused by the court, and the plaintiff's counsel took his bill of exceptions. This decision, says the Judge, was based on art. 352 of the Code of Practice.

The trial went on, and during its progress, after the defendant had introduced evidence in support of his claim, the plaintiff moved the court to allow him to suffer a nonsuit, which was refused by the Judge, *a quo*, on the ground that the defendant, having already produced evidence, could not suffer a nonsuit, but that the case must be adjudged on the evidence before the court. To this opinion, the plaintiff's counsel took his bill of exceptions, in which the Judge states that "the decision was, that a party plaintiff could not claim as a right to be nonsuited, under the circumstances; that he had only a right to discontinue."

Judgment was rendered below in favor of the defendant, and the plaintiff has appealed.

On the first bill of exceptions, we think the Judge, *a quo*, did not err. The defendant is stated in the petition, as residing in the parish of Jefferson, and under art. 351 of the Code of Practice, a party interrogated can be required to answer in open court, only when *he resides in the parish where the court holds its sittings*. The order granted on the application of the plaintiff could not be complied with, as the defendant could not be compelled to appear in open court to answer the plaintiff's interrogatories; and as under art. 352, of the same Code, if the party interrogated reside out of the parish where the court sits, a commission ought to be directed to any Judge or Justice of the Peace in the parish where the party resides, whose duty it is to receive his answers to the interrogatories propounded to him, it was clearly the duty of the plaintiff to apply to the court for an order to issue such a commission.*

* An act of the 10th of February, 1843, enacted subsequently to the decision in the lower court, provides:—

"That the article three hundred and fifty-second of the Code of Practice be and the

Here, the party interrogated was aware that he could not be compelled to answer in open court; that he was not bound to appear personally on the day of the trial of the suit; and, as no order had been applied for and granted to authorize the plaintiff to take out a commission for the purpose of obtaining his answers to the interrogatories before any Judge of his domicile, he was justified in not taking any step to furnish his adversary with the evidence which had been so irregularly called for. If the plaintiff, after ascertaining that the interrogatories had not been answered, had applied for a continuance of the cause, as it was his duty to do, for the purpose of obtaining the defendant's answers in the manner prescribed by law, we are not ready to say that it should have been refused. 14 La. 298. 15 La. 119. 1 Robinson, 80. But surely, he cannot pretend, that his irregular proceeding should turn to the prejudice of the defendant, by taking the facts inquired of, *pro confessis*.

On the second bill of exceptions, we are of opinion that the decision complained of is correct. The plaintiff may, in every stage of the suit, previous to judgment being rendered, discontinue his action on paying the costs. Code of Practice, art. 491. But we know of no law in force in this State, that gives to the plaintiff the right of calling upon the court for a judgment of nonsuit. The general rule is, that when the plaintiff does not make out his case, the judgment against him should be one of nonsuit; but there are circumstances which render this rule inapplicable, and which, from their nature, ought to be considered sufficient to put an end to the matter in litigation. Such circumstances, growing out of the evidence, are left to be decided upon by the court, without any interference on the part of the parties, and seem to

same is hereby repealed, and that, in lieu thereof, the following article be substituted: In all cases where a party interrogated resides out of the parish where the suit is pending, and whether within or without the State, it shall be his duty to file his answer to the interrogatories propounded to him within such period as shall be fixed by the court, on the motion of the party interrogating, and notice of which order, fixing the delay, together with a copy of the interrogatories propounded, shall be served on the attorney representing the party interrogated: *Provided*, that when the party interrogated resides out of the State, his answers shall be taken by commission."

Moreau, Curator, v. Mitaud.

be rather within the sound and legal discretion of the tribunal before which the parties are litigating their rights. So, in the case of *Coleman et al. v. Breaud*, 6 Mart. N. S. 210, this court said, "the whole circumstances of the case do not, in our opinion, call for the interference of this court to reverse the judgment of the District Court, and to enter one of nonsuit;" and in this case, the defendant having already introduced evidence in support of his claim to the property sued for, which was deemed sufficient by the court, *a qua*, to establish his good faith, and to show that the sale had been made for a valuable consideration, we are not ready to say that the court erred in deciding the case upon its merits, and in refusing to nonsuit the plaintiff, as, under the evidence, it was the opinion of the Judge, *a quo*, that the claim set up by the plaintiff should be rejected, not only because it was not satisfactorily made out, but also because the defendant had, by his evidence, shown that the plaintiff's action was unfounded, and could never be made out. Again, the plaintiff was at liberty to discontinue his action before judgment; but he could not claim, as a right, to be nonsuited, and thereby control the final decision of the cause. His remedy, in case of error in the judgment rendered against him, is only by an appeal to this court.

On the merits, we think the court, *a qua*, came to a correct conclusion. The facts disclosed by the record establish conclusively, that the sale attacked by the plaintiff was made in good faith, and that the consideration, which appears to be a valuable one, was paid to the vendor according to the contract.

Judgment affirmed.

MICHEL MOREAU, Curator of the Succession of Joseph Caullery,
Deceased, v. SIMON MITAUD.

APPEAL from the Parish Court of New Orleans, *Maurian*, J.
Castera, for the plaintiff.
Morel, for the appellant.

MARTIN, J. The plaintiff states, that the defendant was indebted to his intestate in the sum of \$300, for money lent on the deposit of certain jewels, and also, in the sum of \$384 5, for the part of his intestate, in the profits of a partnership, between the defendant and one Lassere, in relation to a ball-room.

The defendant, besides the plea of the general issue, alleges that he owes the sum of \$100 only, which he has offered, and has always been ready to pay, on the jewels being restored, having previously paid \$200 of the money borrowed; and that if any partnership existed between himself and the deceased, he is entitled to recover the sum of \$584 5, from the estate, as his share of the profits, which he claims in reconvention.

The plaintiff had judgment for \$684 5, and the defendant has appealed. Our attention is drawn to a bill of exceptions taken by the defendant to the opinion of the court, overruling his opposition to the reading of a document stating the profits made by the partnership. The opposition was grounded on a suggestion, that the document was offered to prove an illegal partnership, to wit, one for affording the means of playing at forbidden games. The Judge overruled the exception, deeming that nothing showed the existence of such a partnership. It does not appear to us that the court erred. The document did not state the partnership to be of the character imputed to it by the defendant.

During the trial it was proved, that the partnership related to a ball-room, and that the profits resulted from money received at the door, or paid for suppers, or which was received from those who resorted to a room in which they amused themselves with cards; but, there is no evidence that any game prohibited by law was allowed.

The plaintiff proved his claim, and the defendant did not establish the alleged payment, nor his demand in reconvention.

Judgment affirmed.

DANIEL M'CAULEY v. JOHN HAGAN.

Charges for drayage of cotton, hauled to a cotton press by an agreement with, and on the sole credit of certain persons, who were in possession of the press under a contract by which the owner stipulated to convey the property to them on certain conditions, cannot be recovered by the drayman against the owner, on his selling the press to other persons. There was no privity of contract between the plaintiff and him, and no proof that he ever assumed to pay the charges.

Decision in *M'Williams v. Hagan*, 4 Rob. 374, affirmed.

APPEAL from the District Court of the First District, *Buchanan, J.*

BULLARD, J. The plaintiff seeks to recover of John Hagan, senior, the amount of an account for drayage of cotton to the Union Cotton Press, on the allegation, that if he was not in possession of the press when the plaintiff commenced hauling, he shortly afterwards became the owner and possessor of the same, and reaped the benefits of his labor, and, when he afterwards took possession, assumed and became liable for all the debts due by the press; and further, that when the defendant took possession of the press, there was cotton remaining in it which the plaintiff had hauled, and for which the press owed him one thousand and twenty dollars, which the defendant is bound to pay.

The evidence shows, that the cotton press was owned by Huie & Chalmers, and mortgaged to the defendant, who caused it to be sold under an order of seizure, and became himself the purchaser sometime in October, 1840. On the day of the sale he entered into an agreement with Huie & Hale, by which it was stipulated, that he should leave them in possession, and reconvey to them, or to any person they might designate, all his right and title upon certain conditions. Hagan remained the owner, and Huie & Hale possessors under this agreement, until the 28th of January, 1841, when he conveyed to Alfred Penn. In the deed there is a stipulation that the purchaser shall be entitled to all privileges and charges upon property in store, and liable for rent; "and whereas, claims have been made against the said Alfred Penn, for work and labor done on said premises previous to possession being delivered to him, and property then in store and

liable for rent has been seized at the suit of A. & J. Dennistoun, & Co., now, therefore, the said John Hagan does hereby bind himself to indemnify and save harmless the said Alfred Penn and his assigns, from all claim or claims of what nature or kind soever, which are or may be hereafter made as above mentioned."

These expressions do not appear to us to amount to anything more than a guarantee to Penn against any claims which he, as purchaser of the press, might be compelled to pay, and not to a *stipulation pour autrui*, binding Hagan to pay any claim for labor done in hauling cotton to the press, when he was nominally the owner, on whosoever's credit it may have been done. It is clear, that the laborer in such a case has no privilege on the cotton after delivery, nor on the press in which it is stored; and, consequently, that Penn could not be disturbed by such a claim.

But it has been urged, that Hagan enjoyed the profits of the establishment at the time he was nominally the owner, although carried on by Huie & Hale. The evidence shows, however, that although collections were sometimes made in his name, the proceeds went to pay debts of Huie & Hale. Hagan was not known as the owner. He does not appear to have made any contracts as such for the benefit of the press. The plaintiff does not pretend that the hauling was done at his instance, or originally on his credit. The amount received by him, and for which he has given credit, was not received from Hagan, but from Huie & Hale, who appear to have carried on the concern as if they had been the owners. The plaintiff has failed, in our opinion, to show either any original privity of contract between himself and Hagan, or any assumpsit, either express or implied, to pay the amount of his account for hauling, which was evidently done on the sole credit of Huie & Hale. We cannot see any substantial difference between this case and that of McWilliams against the same defendant, lately decided. 4 Robinson, 374.

The judgment of the District Court is, therefore, reversed, and ours is for the defendant, with costs in both courts.

Crawford and M^r Henry, for the plaintiff.

C. M. Jones, for the appellant.

PETER HOGAN v. JAMES NICHOLSON.

APPEAL from the Commercial Court of New Orleans, *Watts, J. G. B. Duncan*, for the plaintiff.

F. B. Conrad, for the appellant.

MORPHY J. The petitioner claims \$1318 as a balance due him under contract for work and labor done as a carpenter, in the construction of a house belonging to the defendant, for certain extra work executed at the latter's request, and for putting up two cisterns on the premises. The answer avers that, so far from being indebted to the plaintiff on account of the building of his house, the defendant is entitled to claim of the plaintiff \$1500, by reason of the latter's failure to comply with his contract; that instead of building the house thirty feet square according to the contract, whereby the same would have had a front on St. Mary street of thirty feet, that being the front line of the lot on which the house is built, it was ascertained, some time after the completion of the work, that plaintiff had built it in such a manner as to give it a front of thirty feet and five inches; that the house consequently exceeds the limits of defendant's lot on each side, and encroaches on three or four lots belonging to other persons, as well as on a space of ground intended as a public street; that both gables of defendant's house will have to be pulled down so as to bring the same within the lines of his property; that the cost of the work and alterations thus rendered necessary from the neglect and carelessness of the plaintiff, will be \$800; that in addition to the actual loss and expense, defendant will be put to a great deal of trouble and annoyance, the house being his residence, and all his furniture being in the same; that the contract has not been complied with in many other important particulars, the work in and about the house having been done in a loose and careless manner; that the roof and gable ends are so badly constructed that they leak; that the fence is falling down, &c. The answer further avers that the defendant has paid to the plaintiff about \$620, reducing the balance due on the contract, to \$220, which would have been paid had plaintiff complied with his engagements;

that the alterations, if any were made, diminished the work and labor required by the original contract and plan, and do not entitle the plaintiff to any demand for extra work; and, finally, that his charge for making the cisterns is exorbitant, even were they properly constructed, but that they were built in an unworkmanlike manner, and with bad materials, &c.

The case was tried by a jury, who gave a verdict in favor of the plaintiff, for \$387 45. Without making any effort to obtain a new trial, the defendant suffered judgment to be entered up accordingly, and took this appeal.

The testimony in relation to the defects in the work, and the value of the extra work and cisterns, is contradictory, as is usually the case in difficulties of this kind. It is shown that many of the defects complained of, were owing to the greenness of the materials employed, which were furnished by the defendant; that the plaintiff, who engaged to do the carpenter's work, had nothing to do with the foundations of the house, which were built with bricks; that it is the business of the person who builds the foundations to get the proper lines, and that in constructing a frame house, it is the duty of the carpenter so to lay the frame, that the wood work should project a little, and cover the brick foundations from bad weather, &c. After a full investigation of all the facts of the case, the jury have rendered a verdict with which the inferior Judge has declared himself satisfied. We find nothing in the evidence which makes it our duty to disturb it, especially when its correctness has not been questioned below. We have often said, that objections to a verdict lose much of their weight when not made before the court which tried the cause, and when the record presents only questions of fact. 1 Mart. N. S. 717. 5 La. 446.

Judgment affirmed.

JOSEPH LALLANDE v. BARTHELEMY BOUNY.

One or two partners in a particular adventure, may renew a note given by a purchaser of the partnership property, without exceeding his authority as a partner. Whatever he does fairly and honestly, before the final consummation of the business, will be binding on his co-partner.

APPEAL from the District Court of the First District, *Buchanan, J.*
L. Janin, for the plaintiff.
Canon, for the appellant.

BULLARD, J. This controversy grew out of a speculation of the parties in bank stock, on joint account. A certain number of shares was purchased by them, Lallande furnishing the capital, and the defendant acting as the broker in making the purchase and sale. They were ultimately sold, at a loss, to Garnier, who gave three notes endorsed by Achille Murat. These notes were given over to Lallande, who had made the advances, and Bouny paid his portion of the loss sustained by the parties. The notes were not paid at maturity, but were renewed without objection, at least on the part of Bouny, who when applied to by Garnier, referred him to Lallande. After several renewals, with curtailments, they were finally protested for non-payment. Lallande having had them discounted in bank, took them up, after protest; and the present action is brought to recover of Bouny one-half of the amount, as a further loss to be borne equally by the partners.

The District Court being of opinion, that the notes continued to be at the risk of both parties—that Lallande had not exceeded his discretionary power as a partner, and that the plea of novation was not sustained by the evidence, gave judgment for the plaintiff, and the defendant has appealed.

His counsel contends, in this court, that since the settlement between the parties, and the payment of the loss sustained on the sale of the stock, Bouny had ceased to be the partner of the plaintiff; that he was either discharged from all liability towards Lallande, having paid his share of the loss, and Lallande having been reimbursed his advances by the notes of Garnier endorsed by Murat, which were then good, or was at most the contingent and eventual debtor of Lallande in case the notes were not paid at

maturity; and that, on the last hypothesis, the plaintiff must be regarded as the agent of both parties for the collection of the money.

This argument is certainly ingenious; but appears to overlook the important fact, that when the notes were taken by Bouny for the price of the stock, they became the joint property of the partners, and there is no evidence to show that Lallande consented to receive them as cash, and to discharge Bouny from any further liability. On the contrary, a witness who had an agency in the transaction testifies, that the notes were not taken in payment of the amount advanced by Lallande; but that they were taken for collection on joint account, the defendant continuing to run his risk for one-half of the loss which might result from the transaction.

Such being the case, the question is, whether in renewing the notes in the first instance, or in any transactions in Florida, Lallande has novated the debt, or exceeded the power which his relations with Bouny conferred on him.

According to the defendant's own statement of the case, which was prepared to be submitted to arbitrators, and which is in the record, it appears, that when Garnier applied to him to renew the notes, he answered that it no longer concerned him; that he (Garnier) knew the vendor, and might see him on the subject; that having occasion, afterwards, to see Lallande on other business, he learned from him, that the first note had been renewed, with a curtailment of \$800, to which he (Bouny) said: "you have done wrong, for he called upon me to do it, and I refused, not being disposed to do so."

Upon this statement it may be remarked, that Bouny's censure of the plaintiff for renewing the note does not well accord with his present pretensions that he had no longer any interest in the matter, and shows that, at that time, he considered himself as still interested. But further, instead of refusing, and giving notice to Lallande of his refusal and of his reasons for it, it appears from the statement that he referred Garnier to Lallande, without making known any objections which he may have had.

Under all the circumstances disclosed by the evidence, we are

Grenier v. Thielen, Sheriff, and another.

of opinion that Lallande, in renewing the notes, did not exceed his authority as a partner.

But it appears that Lallande brought suit in Florida against the endorser, Murat, and obtained judgment in his own name, and that Garnier died utterly insolvent. The correspondence in the record, in relation to the business, shows that the judgment was recovered against Murat, and that Gadsden has given certain drafts on Charleston for the purpose of paying the judgment; but that difficulties have arisen between him and the plaintiff on that subject, which do not appear to have been finally adjusted at the time of the trial in the court below. But we do not find in that correspondence, nor in the statements of the witnesses, that the recourse either upon Murat, or Gadsden, has been impaired, to the prejudice of the defendant; and the District Court has reserved his right to participate in any future advantages to be obtained in the prosecution of that negotiation, and of the judgment against Murat. Civil Code, art. 2833.

The parties to this suit must be regarded as partners in a particular adventure or speculation; and whatever was done fairly and honestly by one of them, until the final consummation of the business, is binding on the other. 6 La. 311.

Judgment affirmed.

MEINRAD GREINER v. JOHN L. THIELEN, Sheriff, and another.

The Commercial Court of New Orleans has no jurisdiction of an action to recover damages for an illegal seizure and sale of property. Act 14 March, 1839, sect. 3. The want of jurisdiction in such a case being *ratione materiae*, the Judge is bound to notice it, though not pleaded by the defendant.

APPEAL from the Commercial Court of New Orleans, *Watts, J. Greiner*, appellant, pro se.

Roselius and *Robinson*, for the defendants.

MORPHY, J. The plaintiff has taken this appeal from a judgment of the Commercial Court, dismissing his action on the ground

Greiner v. Thielen, Sheriff, and another.

that it cannot by law entertain jurisdiction of a suit for the recovery of damages for a quasi-offence. The inferior Judge has pronounced the present suit to be a *jesuitical*, *casuistical*, and *sophistical* attempt to invade the jurisdiction of the court over which he presides. Whatever may have been the intentions of the suitor, we cannot consider his action as one arising *ex contractu*. Notwithstanding the manner in which it is presented, this suit, in truth and in substance, is a claim for damages for a quasi-offence. The petition charges that Thielen, Sheriff of the First Judicial District, and Prendergast, are indebted to the plaintiff, *in solido*, in the sum of \$3000, for this, that Thielen, under the direction of Prendergast, took possession on the 28th of March, 1842, of three hundred copies of a book called the Louisiana Digest, published and edited by the plaintiff, and that on the 13th of April following, they offered the same at public sale; that Thielen and Prendergast took possession of said books illegally, and well knowing that they belonged to the plaintiff; that the value of the books was ten dollars per copy; and the petition concludes by praying for a judgment decreeing the defendants, *in solido*, to restore to the plaintiff his books, or to pay him their value, \$3000, with interest and costs, &c.

It is said that this is an action of *detinue*, and, therefore, *ex contractu*; that the petitioner claims the goods detained, or their value, in the alternative, and that so should be the judgment rendered; that, at all events, no exception having been pleaded below, the Judge was bound to determine the case on its merits, and erred in dismissing it, *ex officio*. The allegations of the plaintiff's petition, are inconsistent with the nature of an action of *detinue*, which lies upon a bailment, or finding. The defendant, in such an action, must be alleged or shown to have come lawfully into possession of the goods, either by delivery to him, or by finding them; whence arises an implied obligation, or contract, to return the property on demand, or its value. In the present case it is not alleged that either of the defendants was in the actual possession of the books, the value of which is claimed, at the time of the institution of this suit; but, on the contrary, it is averred that, after illegally seizing or taking possession of the property, the Sheriff offered it for sale, on the 13th of April, 1842; and the plaintiff's

Livaudais v. Haydel.

evidence on the trial shows, that the books were sold on that day, under a *feri facias*, in a suit of *Prendergast v. B. Levy and others*. The form in which it has pleased the plaintiff to bring his action, cannot change its true character; he well knew that the books, of which he claimed a restoration, were in the possession of neither of the defendants, but in that of the purchasers at the Sheriff's sale. His sole object must have been to recover from them, as trespassers, the value of his property, and it is on that ground alone that he must have felt himself authorized to sue them jointly. This suit, then, is clearly, to all practical intents and purposes, one for damages for an alleged illegal seizure and sale of the plaintiff's property; and, therefore, comes within one of the classes of cases excluded from the jurisdiction of the Commercial Court, by the third section of the law creating that court. B. & C.'s D. 234.

The want of jurisdiction relied on by the Judge below being *ratione materiæ*, he was bound to notice it. The law creating the court over which he presides, evidently intended that it should take cognizance principally, if not exclusively, of suits of a commercial nature; hence it has excluded, expressly, from its jurisdiction several classes of cases, among which are actions for the recovery of damages for offences and quasi-offences. The Judge has, in our opinion, taken a correct view of his duty in considering himself bound to protect the jurisdiction of that court for the class of cases for which it was created, and thus to enable himself to dispatch the important business brought before him, with that promptness which was expected of him, and which, in justice to him, we should add, he has always shown.

Judgment affirmed.

MARIE CÉLESTE LIVAUDAIS v. FELICITÉ HAYDEL.

APPEAL from the District Court of the First District, Buchanan, J.

Livaudais v. Haydel.

Derbigny and Labarre, for the plaintiff.

Grima and L. Janin, for the appellant.

SIMON, J. We are called upon to reverse a judgment by which the defendant is condemned to pay to the plaintiff the sum of \$6218 69, a balance due on a certain claim of long standing—the principal originally amounting to \$6000—secured by a special mortgage on the defendant's property.

The facts of the case are these : In the year 1835, the defendant and P. C. Becuel were the joint owners of a plantation and slaves, Becuel owning *two-thirds*, and the defendant *one-third* thereof. One Ambroise Brou was also the owner of another plantation in an adjoining parish. These three persons being largely indebted and unable to meet their engagements, applied, respectively, and separately, for a respite, and a meeting of their creditors was ordered to be convened in each case, and to be holden on the same day, and before the same notary. The creditors of the three applicants met accordingly, and from the *procès verbal* of their deliberations, it appears, that previous arrangements having been proposed and agreed to between the debtors and creditors, only one meeting was held and one vote given by the creditors, the principal object of which was to grant to the debtors a respite of one, two, three, four, five and six years, and to provide not only for the better security of the claims of all the creditors by special mortgages on their debtors' property, but also for the sale of the annual crops to be made on their debtors' plantations, which crops should be disposed of for the purpose of discharging the debts in the manner thereafter set forth. Among the different provisions contained in the *procès verbal*, of the deliberations, as first voted for by Joseph Sauvinet, the sixth provides, that by the act of compromise which is to be subsequently executed, an agent shall be appointed on behalf of the creditors, whose duty it shall be *to receive the yearly crops, to dispose of them by a sale thereof* in the city of New Orleans, or on the plantations, and *out of the proceeds* to pay ; *first*, the proportion due to the Union Bank ; *second*, the interest due thereon ; *third*, the privileged claims ; *fourth*, a yearly sum of five hundred dollars to Ambroise Brou's wife, (who was herself a creditor of her husband for a large amount ;) and *fifth*, the balance to be distri-

buted between the creditors in payment of the capital of their claims for the first five years, the sixth year's crop being to meet the interest (allowed at the rate of six per cent. per annum,) that may have accrued on the debts. The agent was also to be allowed a commission of three and half per cent, on the amount of the sales of the yearly crops.

All the creditors appeared at the meeting, (except the Union Bank, for the payment of whose claim by instalments provision was made,) and adopted in its extent the vote given by Joseph Sauvinet, the first voting creditor, with the final provision that all the conditional clauses, conditions and stipulations intended to be entered into by the act of compromise should be obligatory and binding on all the creditors.

On the 3d of July, 1835, an act of compromise, denominated a "*contrat d'union et d'attribution*" was accordingly passed by authentic act, between the three debtors on the one part, and their creditors on the other part, in which the aggregate amount of all the sums due by the debtors, is ascertained to be the sum of \$183,045 68, including therein the sum of \$30,042 15, owing to Mad. Brou, (the wife of one of the debtors,) that of \$21,037 75, due by A. Brou to the Union Bank of Louisiana, and that of \$15,722 50, due by Becuel to that Bank, and that of \$8,312 50, due by the defendant to the same Bank.

The act of compromise under consideration contains also the following clauses and stipulations:—1o. "Que les sieurs A. Brou, P. C. Becuel, la dame veuve F. Haydel, la société P. C. Becuel & Cie., &c., sont pour l'énumération des créances ci-dessus rapportées, *responsables comme endosseurs ou autrement, les uns pour un ou plusieurs des autres, du paiement de la majeure partie desdites créances,*" &c. 2o. "Que pour sureté du paiement en capital et intérêts, ainsi qu'il sera ci-après stipulé de toutes les sommes respectivement dues par lesdites parties de première part, elles ont par les présentes, affecté, obligé et hypothéqué en faveur de leurs créanciers," &c. 3o. "Les parties de seconde part [the creditors of the three debtors] accordent a leurs débiteurs, le répit d'un, deux, trois, quatre, cinq et six ans, à compter du 20 avril dernier, étant bien entendu que *les sommes provenant de la vente annuelle des récoltes des dites deux habitations sucreries*

pendant les cinq premières années, ainsi que les sommes qui pourront être reçues dans cet intervalle de tems de M. Alex. Baron, seront appliquées au payement desdites dettes en capital seulement, et que la récolte de la sixième année, ainsi que la somme reçue de Baron dans ce laps de tems, seront appliquées au payement des intérêts à un taux de six pour cent par an sur le capital pour la première année, et sur la balance du capital après chaque dividende." 4o. This clause provides for giving further time to the debtors after the expiration of the six years, "*si la dette totale des débiteurs n'était pas [then] acquittée.*" 6o. Louis Pilié is appointed agent by the creditors, with full power and authority, to act, and "*recevoir aussi les récoltes annuelles des sucres et mellasses des dites deux habitations, disposer des dites récoltes en les vendant, &c., payer et acquitter avec les sommes recouvrées de M. Baron, et avec celles provenant de la vente des dites récoltes ;* 1o. The amount due to the Union Bank. 2o. The interest due thereon. 3o. The privileged claims. 4o. \$500 annually to A. Brou's wife. 5o. "*Après ces payements, la balance annuelle pendant les cinq premières années sera divisée entre les autres créanciers, au marc la livre, ou autrement à tant pour cent du montant de leurs créances respectives en capital, à l'égard de la récolte de la sixième année, elle sera employée au payement des intérêts.*"

This act of "concordat" was carried into execution by the agent receiving the yearly crops made on the two plantations, by selling those crops for the benefit of the creditors, and by applying the proceeds to the payment of the debts as provided for by the contract, that is to say, so far as they were to be applied to the extinguishment of the debts due by the three debtors to the Union Bank, to the interest due on the same, to the payment of the privileges, and to the annual payment of five hundred dollars to A. Brou's wife ; and the balance was applied by the agent to the payment "*au marc la livre*" of the debts due by the three debtors without distinction. With regard to this part of the case, the record contains an agreement of counsel, by which the defendant admits all the statements in the accounts filed by the agents concerning the receipt of the crops, the price for which they were sold, and the payments made by the agents, but reserves the right to contest the correctness of the distribution of

Livaudais v. Haydel.

the funds made by them, and to maintain that her proportion of the crops should have been exclusively applied to the payment of her own individual debts, and that the commission of three and a half per cent should, under the contract, be borne by the creditors, and not by the debtors.

The Judge, *a quo*, was of opinion that the payments complained of had been correctly made by the agent under the contract, that according to the stipulations therein contained, the payments were to be divided, *pro rata*, among the creditors, and that the commission due to the agent should come out of the funds by him administered: and accordingly, rendered a judgment liquidating the balance due by the defendant to the plaintiff, at the sum of \$4191 99 of principal, and \$2026 70 of interest, with a right of mortgage on the property described in the petition. The correctness of this judgment is the subject of the present controversy.

In order to ascertain the extent of the interest of the defendant in the amount of debts due by the three debtors, and thereby to enable us to come to a correct conclusion on the object which they had in view, when they entered into the contract under consideration, it is, perhaps, proper that we should first review the extent of their respective liabilities.

The whole amount of the debts is stated to be	\$188,045 68
Out of this amount, the sum of \$30,042 15, due to	
A. Brou's wife, is to be deducted, as not to be	
paid by the agent,	30,042 15
	<hr/>
Balance of debts to be paid,	\$158,003 53
On this sum A. Brou transferred to the creditors	
his claims against Al. Baron, to the amount of	
\$21,900,	21,900 00
	<hr/>

Leaving a balance to be paid with the crops of \$136,103 53

Of this debt the defendant owed, at the date of the act, the sum of \$21,275 60, including therein the debt by her due to the Union Bank, to wit, \$8312 50, to be satisfied first under the contract, with the other sums due to the same bank by the two other debtors, to wit, \$21,037 75 by A. Brou, and \$15,722 50 by Becuel, making an aggregate amount due to the Union Bank of

\$45,072 75, (more than one-sixth of which was the personal debt of the defendant,) to be first paid out of the proceeds of the crops.

Now the aggregate amount of the debts due personally by the defendant, was \$21,275 60, a sum nearly equal to the one-sixth of the whole amount of the debt, to wit, \$136,103 53; and the defendant owned only one-third of the plantation in partnership with Becuel, who owned the other two-thirds, whilst Ambroise Brou owned the whole of the other plantation. Supposing that the two plantations would produce an equal amount of revenue, it is obvious that the defendant was only entitled to one-sixth part of the proceeds of the crops, which would be in accordance with her proportion of the whole debt due to the Union Bank, and with her proportion of the other debt.

Under such circumstances, there is nothing extraordinary in the defendant's joining the two other debtors in the arrangements made with their creditors, and consenting to the proceeds of her portion of the crops being merged in the common fund, to be applied to the extinguishment of the debts due by the three debtors. Indeed, we are informed by the contract, that the debtors are "*responsables comme endosseurs, ou autrement, les uns pour un ou plusieurs des autres, du paiement de la majeure partie des dites créances*;" and among the debts which it is their object to secure and discharge, there is a large amount due by the defendant's co-proprietor, Becuel, and even by the partnership. This was clearly a sufficient inducement for her to consent that the proceeds of the crops should be applied, without distinction, *pro rata*, to the payment of the debts due by herself and by the two other debtors, and she was already aware that such application would nearly equal the interest which she had in the extinguishment of the debts, and in the means which were to be procured for that purpose.

But, by the terms of the contract, it seems to us that there cannot be any doubt as to the intention of the parties. All the debts due by the defendant and by the nephew and brother-in-law, are therein enumerated, and the three debtors, of the one part, "*de première part*," consent that the whole amount thereof shall be paid to the creditors, "*parties de seconde part*," out of the pro-

ceeds of the crops made on the two plantations, during the time allowed by the "*concordat*;" the annual balance proceeding from the sale of said yearly crops to be divided "*au marc la livre*," or by so much per cent on the amount of the principal of their respective claims, and the proceeds of the sixth crop to be applied to the payment of the interest. If it had been the intention of the parties that the proceeds of the crops should be first divided according to their respective and proportionate interest, and then applied to the payment of the debts by them due respectively, they would have said so, as, then, their respective creditors would have known what parts of such proceeds were to be applied to the payment of their respective claims; but this idea is excluded by the very expressions used in the contract, "*la balance des récoltes sera divisée entre les autres créanciers a tant pour cent*," which mean that *all the creditors*, whose names figure in the contract, except the Union Bank, the privileged creditors, and Mad. Brou, shall share, *pro rata*, in the division of the proceeds, without any distinction being made as to the persons by whom the debts may be due, or may have been contracted. That it was so understood, is also clearly shown by the clause which provides for the payments to be made to the Union Bank. It is said in the contract that *the amount due* (exigible) *to the Union Bank* shall be paid first, without any distinction as to the several sums due by the three debtors respectively; whilst, if the parties had intended that their respective portions of the crops should have been first applied to the debts due by them respectively to the Union Bank, this would have been expressed so as to prevent a misapplication of the funds. It is the same with regard to the payment of the privileged claims, and to the sum of \$500 to be paid to Mad. Brou; these sums are to be taken out of the proceeds of the crops, *without any distinction*, and we agree with the Judge, *a quo*, in the opinion, that the surplus, after making such payments, was to be divided, *without any distinction*, between the creditors of the three debtors, in the proportion of the amount of their claims. We may also be permitted to remark, that if the defendant really understood her contract differently, it is not a little astonishing that the proceeds of the crops were distributed by the agent in a

manner contrary to her intention, during six years, without any opposition on her part.

With regard to the proposition that suretyship and solidarity are never presumed, we think, that although perfectly true, it is not applicable to the contract under consideration. Here, there is no suretyship or solidarity contracted. The defendant never became personally bound to pay the debts of the other debtors ; she only consented, that so far as the proceeds of her portion of the crops should be received by the agent, such proceeds should remain among the common funds, to be applied to the extinguishment of the mass of debts, among which her own was included ; and for aught we know, it is not clear that any part of these proceeds ever went to satisfy any other but her own debt. The amount of such proceeds was eventual, and depended wholly upon the success of the subsequent crops to be made on the two plantations. She had the advantage of being able to satisfy her own debts with the portions belonging to the other debtors, in case her crops had failed ; and we see no reason why, under the stipulations of the *concordat*, she should enjoy the advantages resulting therefrom, without subjecting herself to its disadvantageous consequences. She is not bound, *in solido*, with, or as the surety of the other debtors, but she must abide by the stipulations contained in the contract from which she was to be benefited. Its terms present no ambiguity, and we concur with the Judge, *a quo*, in the conclusion which he has adopted.

On the question of commissions, we think the judgment appealed from is correct. The commission of three and a half per cent due to the agent on the amount of the sales of the crops, may be considered as a part of the costs of administration, and ought to be paid out of the funds administered. The object of the agency was to enable the debtors to pay their debts within the time allowed to them by their creditors ; it was for the benefit of the former ; and, under the circumstances of the case, we are not ready to say that the expenses incurred by the debtors' insolvency, should be thrown upon the indulgent creditors who consented to wait six years, and more, for the payment of their claims. This, it seems to us, could not be done without injustice.

Judgment affirmed.

FELIX RIEDER v. GASPARD THEURER.

Where the holder of a note endorses on it that he has received from the maker four smaller notes, amounting together to the sum for which the first note was given, which, when paid, will be in full of the original note, he may sue on the latter, but to protect the defendant from the danger of suits by endorsees of the smaller notes, the judgment should provide that no execution be issued, nor the judgment itself be recorded by the Recorder of Mortgages, until the smaller notes are delivered to the defendant, or deposited for him in court.

APPEAL from the Parish Court of New Orleans, *Maurian, J.*
MARTIN, J. The defendant is appellant from a judgment on his promissory note, the payment of which he resisted on an allegation that the note had been divided into four others. It appears by an endorsement on the back of the note, that the plaintiff had received from the defendant, after the maturity of the note, four smaller ones, amounting together to the sum due on that sued on, which the plaintiff declared would be, when paid, in full of the original note.* This endorsement certainly precluded the plaintiff from suing on the original note, without tendering the four smaller ones. But he was not obliged, as the defendant states in his answer, to institute a suit on the smaller notes, or on any of them. Had the latter, instead of urging the plaintiff's obligation to do so, demanded that judgment should not be given against him, or that its execution should be suspended until the four small notes were returned to him, he might, perhaps, have claimed at our hands the costs of the suit in the Parish Court. That court ought, however, in our opinion, to have protected him from the danger of being sued by the endorsers of the plaintiff on the small notes. He is entitled to this relief at our hands, and it is our duty to amend the judgment in this respect. For aught that appears on the record, these notes may be afloat.

It is therefore ordered, that the judgment be affirmed, with this amendment, to wit, that no execution shall issue thereon, nor shall the judgment be recorded in the office of mortgages, until the four

* This action was instituted before the maturity of the last of the four smaller notes.

Caldwell and another v. Mayes.

smaller notes enumerated on the back of the original one shall have been delivered to the defendant, or deposite^d for him, duly cancelled, in the office of the Clerk of the Parish Court. The costs of the appeal to be paid by the plaintiff and appellee.

Canon, for the plaintiff.

Eyma, for the appellant.

JOHN CALDWELL and another v. WILLIAM J. MAYES.

Plaintiffs having obtained a judgment against defendant in another State, instituted a suit on the judgment here, attaching certain property, and, pending the attachment, transferred their judgment to one of their creditors, to be applied towards the satisfaction of his claim. A third person having intervened in the attachment suit, and proved the property to be his, claiming damages for the illegal attachment, against the plaintiffs and their transferee: *Held*, that the damage sustained by the intervenor resulted from the original levy of the attachment; that the plaintiffs having, even after the transfer, a greater interest in the action than their transferee, the latter could not have dismissed the attachment; and that, consequently, judgment for damages could be rendered only against the plaintiffs.

APPEAL from the Commercial Court of New Orleans, *Watts*, J.
C. M. Jones, for the plaintiffs and the appellant.

Rozier, *I. W. Smith* and *Peyton*, for the intervenor.

MORPHY, J. R. G. Hazard, a manufacturer of negro clothing in Rhode Island, shipped to Caldwell & Hickey, the factors of the defendant, a planter in Mississippi, several bales of negro clothing, which, under an agreement entered into between him and the defendant, were to be forwarded to the latter only on the acceptance by Caldwell & Hickey of Hazard's draft on them for the amount, to wit, \$600. Caldwell & Hickey having failed to accept the draft, and Mayes being unable to comply with his contract with Hazard, by giving a satisfactory acceptance in New Orleans, he instructed his factors to return the goods, or keep them subject to the order of Hazard. With this full knowledge of the latter's ownership of the goods the plaintiffs levied an attachment on them to satisfy a judgment they had against Mayes. Shortly after the institution of the suit, they transferred to John

Caldwell and another v. Mayes.

Hagan the judgment sued on, stating in the instrument, that any amount received by him on account of the assignment was to be credited on a judgment he had against them. After the assignment, Caldwell & Hickey appear to have continued to prosecute the suit in their names, but for the benefit of J. Hagan. Hazard intervened, claimed the goods, and prayed for damages both against the plaintiffs and J. Hagan. There was a judgment below, in favor of the intervenor, for the property attached, and for \$150 damages against the plaintiffs and Hagan, *in solido*. Hagan has appealed.

Admitting that damages were properly awarded in this suit against Caldwell & Hickey, for the loss and injury sustained by the intervenor from the deterioration of the goods during the pendency of the attachment, it appears to us that the appellant has reason to complain of the judgment below. It is not shown that he participated in the bad faith of the plaintiffs, or knew anything of the circumstances of the case. Being himself a judgment creditor of Caldwell & Hickey, he simply received of them an assignment of the claim, the object of which appears to have been, to secure to him whatever might be recovered in the suit. It is said that as soon as he acquired a knowledge of the intervenor's right to the property, he should have released it from the attachment. Although the suit purported to be prosecuted for Hagan's benefit, as he was to receive whatever was recovered, it is by no means obvious, that he had the power to dismiss the attachment. The plaintiffs, his assignors, had as great, and even a greater interest in the suit than he had. If nothing was recovered, his claim against them remained undiminished by the assignment. He could not then, perhaps, without their consent, release the property from their attachment; but be that as it may, the appellant's knowledge of Hazard's right was acquired only on the return of the commissions issued in the case, long after the attachment had been laid, and after all the injury sustained by the intervenor had occurred.

It is therefore ordered, that the judgment of the Commercial Court be reversed, and that ours be in favor of John Hagan, with costs in both courts.

Girarthy v. Campbell.

PATRICK GIRARTHY v. GEORGE W. CAMPBELL.

One who has contracted for a building has no right, by cancelling his contract with the undertakers, to disappoint the expectations of persons, who, on the faith of the contract, have entered into engagements to furnish the latter with materials, or to bestow their labor on the work.

APPEAL from the District Court of the First District, *Buchanan, J.*

Lockett and Micou, for the plaintiff.

G. Strawbridge, for the appellant.

MARTIN, J. The petition states that Davidson, who was the undertaker of a house which the defendant had employed him to build, contracted with the plaintiff to furnish flag stones, and to lay them as a *banquette* or side-walk, in front of the house : that accordingly he furnished and laid the stones, for which, by the terms of his contract with Davidson, he is entitled to \$450, which sum he demanded first from Davidson, and afterwards from Campbell, without success : that before his work was completed, Davidson and Campbell, without the plaintiff's knowledge, cancelled and annulled the contract into which they had entered for the building of the house, payments having, in the meanwhile, been made, in anticipation, to the former by the latter, to a greater amount than the present claim of the plaintiff, of which claim the defendant had notice, and the amount of which he retained in his hands in settling with Davidson : that the payment thus made in anticipation cannot be opposed to the plaintiff, whose right to a privilege on any sum which might hereafter become due to Davidson on the final completion of his undertaking, could not be affected by the defendant's and Davidson's annulling and cancelling their contract to the plaintiff's injury. The defendant pleaded the general issue. There was a judgment against him, and he has appealed. It does not appear to us that the First Judge erred. His judgment is grounded on evidence establishing the assumption of the plaintiff's claim by the defendant, and clearly proving the amount of that claim. The testimony further shows, that after Davidson withdrew from his engagement with the defendant, the

Van Buren v. The Citizens Bank of Louisiana.

latter urged the plaintiff to complete the paving which he had begun; and the work being stopped because the lime and sand which Davidson had engaged to furnish were not sent, the defendant had them brought, to enable the plaintiff to proceed with his work.

It also appears to us clear, that when a person contracts for the building of a house, he has not a right, by cancelling his contract with the undertaker, to disappoint the hopes of those who, on the faith of the contract, have entered into engagements to furnish him with materials, or bestow their labor on the work, especially when the materials have been furnished to a considerable extent.

Judgment affirmed.

PHILIP VAN BUREN v. THE CITIZENS BANK OF LOUISIANA.

Defendants having offered a reward of a certain sum, for the apprehension and conviction of any of the persons engaged in the circulation of certain counterfeit bills, plaintiff, who had arrested and procured the conviction of one of the persons, claimed the reward. Defendants refused to pay the amount, on the ground that they had already paid the sum named to others who had undertaken to effect the arrest of some of the offenders, but who had not succeeded in convicting any. *Held*, that admitting that the defendants were bound to pay but one reward, the conviction, by the plaintiff's procurement, entitled him to it.

APPEAL from the Commercial Court of New Orleans, *Watts, J. Benjamin*, for the plaintiff.

Grima, for the appellants.

MARTIN, J. Counterfeited bills of the Citizens Bank having been in circulation, the Board of Directors caused an advertisement to be inserted in a gazette, offering a reward of \$500 for the apprehension and conviction of *any of the persons* engaged in the circulation; and in another advertisement in the French language, the reward is promised to be paid for the apprehension and conviction of *any one of the persons* engaged in the circulation. The plaintiff procured the arrest and conviction of one of the

Ranney v. The Orleans Navigation Company.

persons thus engaged, and a few days after the conviction demanded from the defendants the promised reward. It was refused, on the allegation that it had not been offered for the apprehension and conviction of more than one of those persons, and that \$500 had already been paid by the defendants, for the apprehension of another individual than the one procured to be arrested and convicted by the plaintiff; whereupon the present suit was brought. The defendants pleaded the general issue, and urged the above allegations.

There was a verdict and judgment for the plaintiff, and the defendants appealed, after an unsuccessful attempt to obtain a new trial.

It does not appear to us, that they are entitled to relief at our hands. The evidence shows the arrest, by the procurement of the plaintiff, of a person engaged in the circulation of the counterfeit notes, the conviction of the offender, and the demand of the reward immediately after the conviction. The defendants have, indeed, shown that they had previously paid \$500 to a person, who had undertaken to travel and labor for the apprehension and conviction of some of the offenders, without, however, having succeeded in convicting any of them. Admitting that the French advertisement controlled that in the English language, and restricted the obligations of the defendants to the payment of one reward, on which it is useless that we should express any opinion, the conviction by the procurement of the plaintiff entitled him to the reward.

Judgment affirmed.

HENRY JOSEPH RANNEY v. THE ORLEANS NAVIGATION COMPANY.

Plaintiff having recovered a judgment against defendants, caused a *fi. fa.* to be levied on a certain portion of a rail road belonging to them, and on certain fixtures, machinery, lumber, and other personal property connected with the road. The whole was offered for sale *in globo*, the Sheriff producing at the sale a certificate from the Recorder of Mortgages showing the existence of a mortgage, having a preference over

Ranney v. The Orleans Navigation Company.

the plaintiff, in favor of third persons, "on all the rights, privileges, immunities, and titles of the Company." Plaintiff, was the highest bidder, but offered a sum less than the amount of the mortgage. The officer returned that there had been no sale. On a rule on the latter, the defendants, and the mortgagees, to show cause why the property offered for sale should not be delivered to plaintiff: *Held*, that there was no adjudication, and that the rule should be discharged.

APPEAL from the District Court of the First District, *Buchanan*, J.

L. Peirce, for the appellant.

Roselius, for the defendants.

BULLARD, J. This is an appeal from a judgment of the District Court discharging a rule taken by the plaintiff on the Sheriff and the defendants, as well as on the First Municipality, to show cause why the effects purchased by him, under the writ of *fiery facias* in this case, should not be delivered over to him.

It appears that the Sheriff, in obedience to the writ, seized one mile of the rail road belonging to the defendants, with the iron, timber, and all the fixtures as it now stands, thirty pair of rail road wheels, with springs, boxes, axles, &c., two mud-machines, four flats, three pile-driving machines, the contents of a blacksmith's shop, one grindstone, about 4000 feet of lumber, 20 cords of wood, one desk and one table, together with all the fixtures, tools and apparatus thereto belonging: that the whole was offered for sale, *in globo*, the Sheriff producing at the time of the sale a certificate of the Recorder of Mortgages, showing an outstanding mortgage in favor of the First Municipality for \$200,000, upon all the rights, privileges, immunities and titles of the Navigation Company, under its charter. The sale was not preceded by any appraisement. The Sheriff's return shows that the plaintiff bid one thousand dollars, "which bid," says the return, "under article 684 of the Code of Practice, did not constitute a sale of the property, and I, therefore, return this writ, nothing made thereon."

Thus it appears that there was no adjudication to the plaintiff according to the Sheriff's return, nor does the testimony of the Deputy Sheriff, who was examined, establish the fact. On the contrary, the deputy told the plaintiff that it was no sale unless he assumed the mortgage according to the certificate of the Recorder; nor was there any appraisement of the property, and we are not

Edwards v. Turner and another.

prepared to say that property of that description can be legally sold by the Sheriff, without appraisalment.

Judgment affirmed.

ALBERT EDWARDS v. SUMPTER TURNER and another.

An attachment bond, executed in favor of the defendant, does not enure to the benefit of a third person who intervenes and establishes his right to the property, not being a party to the bond, and there being no privity of contract between him and the plaintiff in the attachment suit, he cannot sue on it.

As between the principal and surety in an attachment bond, and the defendant in whose favor it is executed, a claim for damages for an illegal attachment is *ex contractu*; but if the property of a third person be attached under proceedings authorizing the seizure of that of the defendant, it is a trespass, and the right of the party injured to obtain reparation arises neither from a contract, nor quasi-contract, but under art. 2294 of the Civil Code, which declares that every act of man which causes damage to another, obliges him by whose fault it happened, to repair it.

The distinction between offences and quasi-offences is, that the former are those illegal acts which are done wickedly and with the intent to injure, while the latter are those which cause injury to another, but proceed only from error, neglect, or imprudence.

The attachment of the property of a third person, as belonging to the defendant, is a quasi-offence; and the action by the owner for damages is prescribed by one year from the time of the injury—that is, from the time of the seizure, and not from the date of the judgment establishing the title of the owner. C. C. 3501, 3502.

APPEAL from the District Court of the First District, Buchanan, J.

W. S. Upton, for the appellant.

C. M. Jones, for the defendants.

MORPHY, J. The plaintiff seeks to recover of the defendants, the surviving partners of the late firm of Shields, Turner & Renshaw, \$6000, for damage alleged to have been sustained by him in consequence of the wrongful seizure of the steamboat Echo, his property, by attachment, in proceedings instituted by the said firm against Perry, McClure & Co. Among other exceptions and means of defence set up by the defendants, they pleaded the prescription of one year, against actions in damages for offences

and quasi-offences. This plea having been sustained by the court, the plaintiff took this appeal.

The facts in relation to the attachment suit, so far as it is necessary to state them here, are, that the writ was levied on the steamboat Echo, as the property of McClure, on the 27th of November, 1838 ; that on or about the 6th of December following, Edwards intervened, claiming the ownership and possession of the boat, and procured her release by the execution of a satisfactory bond in the usual form ; and that in July, 1839, there was a judgment in the Commercial Court in favor of the intervenor, which, on an appeal taken by the plaintiffs in that suit, was affirmed by this court on the 7th of December, 1840. See 16 La. 465. The present action was brought on the 17th of February, 1841.

It is urged, that the Judge has erred in viewing the cause of action set forth in the petition as constituting a *quasi-offence* ; that it should rather be considered as an implied or quasi-contract ; because, when the attachment was sued out, a bond was given to secure the defendants in that suit against the damages they might suffer thereby, in case it should be decided that the attachment was wrongfully obtained ; that if Perry, McClure & Co. had instituted a suit upon the bond, the defendants could not avail themselves of any defence under the plea of prescription as for a quasi-offence, by reason of the direct and written contract between the parties ; that although the bond is not made to the intervenor, (who claims damages for the same act,) it cannot be said to be a *quasi-offence* as to him, and not as to the original defendants ; and that in making a written contract with Perry, McClure & Co., there was, on the part of the plaintiffs in that suit, an implied contract with any other person who might sustain damage by reason of their attachment, to pay all such damage, if the seizure was decided to be wrongful. We cannot assent to such reasoning. It is clear that the plaintiff has not sued, nor can he sue upon the attachment bond. It cannot enure to his benefit. He was no party to it, and there existed no privity of contract whatever between him, as intervenor, and the plaintiffs in the attachment suit. 7 La. 232. As between the principal and surety in a bond, and the defendant in whose favor it is made, a claim in dam-

ages would undoubtedly be *ex contractu*; but if the property of A. be attached under proceedings authorizing the seizure of that of B. it is a case of trespass. The right of the injured party to obtain reparation, arises neither from a contract, nor a quasi-contract. It can be claimed only under that article of our Code which declares; that any act whatever of man, that causes damage to another, obliges him by whose fault it happens to repair it. Art. 2294. This article, which is the first one under the head of "offences and quasi-offences," applies to both. The distinction between the two appears to be, that offences are those illegal acts which are done wickedly and with the intent to injure, while quasi-offences are those which cause injury to another, but which proceed only from error, neglect, or imprudence. 1 Pothier, Oblig. No. 116. 11 Toullier, No., 113, 114 and 115. The cause of action set forth in the petition comes evidently under the latter class, and is barred by one year under article 3501 of the Civil Code, 9 Mart. 624. 3 La. 338. 5 Ib. 326. 10 Ib. 219. 1 Robinson, 75. But it is next urged, that admitting the act which caused the damage for which reparation is claimed, to be a quasi-offence, prescription should begin to run only from the date of the judgment of this court settling Edwards' title to the property seized, and that the record shows that this suit was brought within a few weeks from the rendition of such judgment. Article 3502, which immediately follows that creating the prescription of one year in cases of offences and quasi-offences, provides, that such prescription shall run from the time when the damage was sustained. The seizure of the Echo took place on the 27th of November, 1838, and the plaintiff recovered possession of her about ten or eleven days after. Admitting that the damages claimed are not only for the immediate injury occasioned by the seizure, but also for the loss of the profits of the business season, which had just opened, the plaintiff must have sustained these damages within the six months at most immediately following the date of the seizure, and the present suit was not brought until the 17th of February, 1841, more than two years after the seizure. Notwithstanding the pendency of his intervention, the plaintiff in this suit could have brought his action in damages within the time required by law, and was not obliged to await the

Lawrence v. Hozey, Sheriff, and others.

final decision of this court on his right to the property seized. To succeed in his action he would have had to prove the fact of the ownership of the boat, as he did in the attachment suit. Under the positive provision of the Code, which declares that prescription must run from the time the injury was sustained, we do not feel authorized to fix any other *terminus a quo*. 6 Mart. N. S. 691.

Judgment affirmed.

ARCHY B. LAWRENCE v. CHARLES F. HOZEY, Sheriff, and others.

Defendants, in the absence of plaintiff, seized under a *f. fa.* against a third person, furniture belonging to the plaintiff, and sold it. The plaintiff's landlord afterwards claimed and received the proceeds, in virtue of his privilege on the furniture for rent. In an action for the value of the furniture against the Sheriff and the seizing creditors, there was a judgment for the defendants. On appeal: *Held*, that the court below erred; that it is no excuse for the defendants, if their acts were illegal and caused damage to the plaintiff, that they gained nothing by them, and that another got the money they were endeavoring to obtain; that the course pursued by the defendants compelled the landlord to assert his claim, and that it is not shown that he would, in the absence of the plaintiff, have taken any step to have the furniture sold. Case remanded.

APPEAL from the District Court of the First District, *Buchanan, J.*

GARLAND, J. This suit is brought to recover the value of certain household furniture, which the plaintiff avers belonged to him, and was seized and sold by Hozey, as Sheriff, under three executions, in favor of the other defendants, against one Rufus Dolbear, and for damages caused by such illegal seizure and sale. Hozey answers, that he acted as a public officer in obedience to the writs directed to him, and the orders of his co-defendants, and prays for a judgment against them, if he is condemned to pay for the property, or any damages. The defendants, Hepburn, Delaplaine, and Brower & Co., answer by a general denial.

From the evidence in the case, it seems that a considerable por-

VOL. VI. 49

Lawrence v. Hozey, Sheriff, and others.

tion of the furniture at one time belonged to Dolbear, but that some time before the seizure and sale, he had sold it to the plaintiff, and, as appears by a notarial act, about the same time transferred to him the lease of the house in which the furniture was, with the consent of the landlord. Some weeks after this, the plaintiff left this city for Philadelphia on business, and during his absence, committed the care of the premises and furniture to Dolbear, who, with his family, left the house and went into the country, about the first of June. In the absence of both Dolbear and the plaintiff, the property was sold. It is clear, from the testimony, that a portion of the furniture seized and sold never did belong to Dolbear, which the witnesses estimate to have been worth from \$250 to \$400. The plaintiff and Dolbear lived in the same house at the time of the sale, the latter having married the adopted daughter of the former. It is shown, that the consideration of the sale was a debt which Dolbear had been owing to the plaintiff for a considerable time.

After Hozey had sold the property, the landlord, Barton, asserted that he was entitled to the proceeds, as he had a privilege on all the furniture for the rent of the house. This claim was sustained, and the funds were paid to him. In consequence of this fact, the District Judge entered a nonsuit,* and the plaintiff has appealed.

We are of opinion that the court below erred. It is no excuse for the defendants, if their acts were illegal and caused damage to the plaintiff, to say that they gained nothing by them, and that another got the money they were illegally endeavoring to obtain. It is not shown that Barton was at all uneasy about the rent of his house, or that he would, in the absence of the plaintiff, have taken any step to have the furniture seized and sold. The course pursued by the defendants compelled him to assert his claim, but does not legalize their proceedings, if contrary to law.

We do not intend to express any opinion upon the merits of this case further than to say, that the Judge erred in entering a

* This is a mistake—the judgment below was an absolute one in favor of the defendants.

The Com'rs of the Exchange & Banking Co. of New Orleans v. Mudge and another.

nonsuit against the plaintiff. The sale to the plaintiff is not alleged to have been fraudulent, or for the purpose of giving a preference to a particular creditor; nor does it appear that any means were ever taken to revoke it.

The judgment of the District Court is annulled and reversed, and the cause remanded for a new trial, to be proceeded in according to law; the defendants and appellees paying the costs of the appeal.

E. C. Mix, for the appellant.

G. Strawbridge, for the defendants.

THE COMMISSIONERS OF THE EXCHANGE AND BANKING COMPANY OF NEW ORLEANS v. ENOCH R. MUDGE and another.

A bank will not be considered as insolvent, merely because it has gone voluntarily, or been forced into liquidation under the act of 14th March, 1842, relative to the liquidation of banks. The provisions of the act do not authorize such a presumption, nor contemplate the insolvency of the Bank as a cause for the forfeiture of its charter; the charter may be forfeited by a violation of its provisions, without the Bank being insolvent.

It is only when the whole amount of the capital stock of a bank, together with its assets, is insufficient to meet its liabilities, that it can be said to be insolvent.

The provision of the act of 26 March, 1842, which declares "that nothing contained in the act to provide for the liquidation of banks, or other laws of the State, shall be so construed as to deny to any persons having notes to pay in banks in liquidation, the right of paying said notes in the bank notes of said liquidating banks;" though it mentions only *notes*, should, by a liberal and fair construction, be extended to all debts due to the banks, though not in the form of notes. The provision of the second section of the act of 5 April, 1843, "that it shall be the duty of each of the banks of the State, at all times, to receive in offset or part offset of debts due to it, its own debts when liquidated and past due, whether for circulation, deposits, or arising from any other source whatever, and whether such bank be, or be not in liquidation, and without reference to the date at which the debtor offering such transfer may have acquired the claim by him offered in offset," may be considered as declaratory of the former intention of the legislator.

APPEAL from the District Court of the First District, *Buchanan, J.* The petitioners state, that the defendants are indebted to them, as Commissioners of the Exchange and Banking Company of New Orleans, in the sum of \$6500, for rent accruing from the

The Comr's of the Exchange & Banking Co. of New Orleans v. Mudge and another.

10th January, to the 10th March, 1843, under a contract by which the defendants, on the 20th April, 1840, leased from the late corporation, known as the Exchange and Banking Company, the St. Charles Hotel, for five years, from the 1st October, 1840, binding themselves to pay a rent, at the rate of \$26,000 per annum, payable in monthly instalments, commencing on the 10th of November, and ending on the 10th of July. The answer avers, that the lease was entered into with the Bank while yet in full operation as a bank of discount and circulation, long before it was put in liquidation under the act of 1842: that at the time the rent claimed became due, the defendants were, and that they still are owners of certain notes or obligations in writing of the Bank, commonly called bank notes, issued by the Bank under and by virtue of its charter, forming a part of the circulation of the Bank, to an amount greater than the rent claimed in the petition; which notes are annexed to the answer, and alleged to have been tendered to the plaintiffs before suit. The respondents aver that they are entitled to compensate the notes against the plaintiffs' demand.

The plaintiffs offered in evidence the lease, and the record of the case of *The State v. The Exchange and Banking Company*, putting the Company in liquidation. It was admitted, that the defendants owned and held the notes described in their answer; that they had tendered them in compensation to the plaintiffs, before the suit was commenced; that the notes were issued and put in circulation by the Bank previous to its being put into liquidation, but that they came into the possession of the defendants after that event. It was also admitted that the act of 5th April, 1843, relative to the banks, was published in the official State Gazette, on the 11th of April, 1843. The plaintiffs having obtained a judgment below, the defendants appealed.

L. Peirce, for the plaintiffs. The record contains this evidence that the Exchange and Banking Company was insolvent. In the proceedings on behalf of the State against the Company, the Attorney General, in his petition, avers that the affairs of the Company have been so mis-managed as to reduce said corporation to a state of insolvency; that on account of the insolvent circumstances of said Bank, and the mismanagement of its affairs, it is

The Comr's of the Exchange & Banking Co. of New Orleans v. Mudge and another.

necessary for the protection of the creditors, that all its assets and property should be sequestered, and placed in the possession of the Board of Currency, according to the 16th section of the Act of February 5th, 1842.

The judgment of the court recites what took place, to wit, that the defendants admitted (in open court) the allegations of the plaintiffs' petition, and that it was upon the facts alleged in the petition that the forfeiture was ordered.

There must be a *presumption* of *insolvency* whenever any of the *acts* or omissions expressed in the law of 1842, as causing a forfeiture of the charter, occur. If the Bank does not pay in gold and silver, it is because she cannot. If she has property she would sell, mortgage, or pledge it, to save herself. Her not doing so is proof of her present insolvency. It is for the other party to destroy the presumption so raised, and to prove that the assets are sufficient.

As to any balance due on stock, to the plaintiffs, there is nothing in the record on the subject; and the stock must be presumed to have been paid by the stockholders because due, unless the contrary be shown.

It is not denied that, *in tiempo inhabil*, and much more so, after failure, no alteration can be made in the situation of the creditors of an insolvent, so as to give any advantage. *Bossier's Syndics v. Belair et al.*, 1 Mart. N. S. 481. 6 Ib. N. S. 67. 2 La. 84.

The law of 1843 is prospective. Civil Code.

The debt was due before it was promulgated. The sum of \$6500 now claimed, was sued for before the law was passed. Where a law was to be passed, allowing individuals to purchase claims against insolvent estates, and to compensate them against debts due by them, would the court apply it to a case of insolvency already opened; where the *concurso* was established? No. Because the creditors' rights are already fixed, and one creditor shall not take advantage of the others.

Every law is prospective.

"Partout où la rétroactivité des lois serait admise, non-seulement la sûreté n'existerait plus, mais son ombre même.

Il est des vérités utiles qu'il ne suffit pas de publier une fois, mais qu'il faut publier toujours, et qui doivent sans cesse frapper

The Comr's of the Exchange & Banking Co. of New Orleans v. Mudge and another

l'oreille du magistrat, du juge, du législateur, parce qu'elles doivent constamment être présentes à leur esprit."

"Le Code Civil a eu soin de répéter, art. 2: la loi ne dispose que pour l'avenir; elle n'a point d'effet rétroactif."

Portalis, Exposé des Motifs du Tit. 1. du Code Civil, cited in Merlin Répertoire, Tit. Effet Rétroactif. Code L. 7, De Legibus.

At the time of the passage of the law of 1843, this debt was due, was sued for, and under our laws was payable in specie; and had been taken away from a formerly existing corporation, known as the Exchange Bank, and had been given to the mandataires of the creditors of the public, who were interested in an equal distribution of the effects, and in the termination of the mismanagement which had led to insolvency.

Grymes, for the appellants. While the Exchange and Banking Company was in the full exercise of its franchises and privileges as a bank of discount, deposit, and circulation, the defendants leased of them for a term of years, the St. Charles Hotel in the city of New Orleans, at the yearly rent of twenty-six thousand dollars, as appears by the lease dated the 20th of April, 1840. The Bank was afterwards put in liquidation, under the act of the 14th of March, 1842. The defendants, after the Bank was placed in liquidation, became the holders of the bank notes which formed a part of its circulation, to the amount of the rent claimed in this suit, as set forth in their answer.

They tendered these notes in payment of the rent claimed in this suit. They were refused by the Commissioners, and the defendants have pleaded the same in compensation of the demand of the plaintiffs for the rent due.

The only question presented for the consideration of the Court is, can the bank notes held by the defendants compensate the plaintiffs' demand for rent under the lease?

This right is resisted by the plaintiffs, because of the presumed insolvency of the Bank, inferred from the fact of its being placed in liquidation.

The defendants insist upon this right, because in no part of the act (see laws of 1842, page 234,) is the insolvency of a bank contemplated as a cause of the forfeiture of its charter, or of placing it in forced liquidation. An attentive examination of the act must

The Com'rs of the Exchange & Banking Co. of New Orleans v. Mudge and another.

result in the conviction that the Legislature has studiously avoided the use of the term *insolvency*, or any other expression which could induce the belief that any such state of things was in its contemplation.

The first section of the act describes for what causes the charter shall be forfeited, and the forced liquidation take place. Its language is : " That, whenever any bank of this State, located in the city of New Orleans, by any act of *omission, or violation* of law, shall have incurred the forfeiture of its charter, &c." The second section provides for the voluntary liquidation. It declares that when a petition shall be presented by the Board of Directors, or six stockholders of the Bank, setting forth, that " the charter of such bank has been forfeited, *or that from the reduction of its capital*, such corporation no longer affords a reasonable security, &c." And in prescribing the mode of proceeding, the stockholders alone are to be called to deliberate upon the expediency, or propriety of surrendering the charter. If a state of insolvency was in the contemplation of the Legislature, and such proceedings were designed, in fact, as proceedings in bankruptcy or insolvency, it would certainly be more consonant to justice, and to the jurisprudence and practice of the State, to call the creditors in to a share in the deliberations, and the future management, and administration of the property of the Bank.

In every part of the act, the terms, *forced*, and *voluntary liquidation* are used, as if purposely to distinguish the case from one of insolvency, or forced, or voluntary cession of goods. See the 8th and 9th sections of the act.

The 26th section provides for the distribution of the surplus funds among the stockholders after paying all the debts of the bank.

The language of this section is relied upon as conclusive to show, that such proceedings were never contemplated or designed by the Legislature, as proceedings in insolvency, or as a *cessio bonorum*.

The proviso of the 29th section shows, that the interest of the State and the stockholders were alone in contemplation of the Legislature ; and creditors are no where mentioned in the act, but in relation to the payment in full of their claims.

The Com'rs of the Exchange & Banking Co. of New Orleans v. Mudge and another.

But suppose that the defendants should be in error, as it regards their first point, just stated. They are the holders of the notes set forth in their answer, which are a part of the circulation of the Bank ; and they contend, that by a fair interpretation of the law, they are entitled to the benefit of compensation.

The law clearly contemplates the notes of the Bank, in circulation, as a debt of the highest dignity and privilege. The language of the 16th section cannot have any other meaning. The commissioners are directed to proceed to redeem them as *speedily as practicable*, and to accomplish it, they are authorized to borrow money at an interest of ten per cent, per annum, and to mortgage or pledge the property of the Bank for such loan. Surely it is less onerous to redeem them by receiving them in payment of debts due to the Bank, than to borrow money for the purpose, on mortgage or pledge, at a high rate of interest, which, from the letter of the law, as well as its spirit and meaning, the Commissioners are bound to do, if they cannot be redeemed in any other manner.

This preference and privilege in favor of the circulation, is again reiterated, in equally clear language, in the 27th section of the act, which provides that when any bank shall have paid its deposits and circulation, or has deposited the amount thereof in some other bank, or has made an arrangement with another bank to pay them, then the whole management of the bank shall be given up to the stockholders, without regard to its other liabilities, *its capacity* to pay its other creditors, or in any way providing for, or protecting them ; thus clearly showing the all absorbing solicitude of the Legislature was for the *circulation* and deposits. This view of the law might be supported by various reasons of justice and public policy, in relation to the currency of the country, and its credit and good faith, which it is deemed unnecessary to give at length here, as they must naturally suggest themselves to the Court.

The whole context of this 27th section furnishes another and very strong argument in relation to the defendant's first point, that the proceedings under this act were never intended to be in the nature of bankrupt or insolvent proceedings ; or, surely, some provision would have been made for the mass of the creditors, and

The Com'rs of the Exchange & Banking Co. of New Orleans v. Mudge and another.

the whole property and assets of the Bank would not have been restored to the possession and management of the stockholders on the circulation and deposits being secured, if such was the intention of the Legislature. The Judge of the District Court in his reasons for the judgment rendered by him, appears to have based his judgment merely on the supposed inapplicability of the proviso in the 1st section of the act of the 26th of March, 1842. See laws of 1842, page 454. We agree with the Judge if he means to say, that this particular case is not provided for in terms; but we cannot but think that it affords a very strong argument in support of our position, and shows, very clearly, the continued solicitude of the Legislature for the holders of the notes of the Bank in circulation, and a strong disposition to accomplish their speedy redemption by compensation, or in discharge of debts due the Bank.

In the Court below the act of the 5th of April, 1843, is got rid of, because it was passed after this suit was brought. The facts are these: This suit was instituted on the 4th day of April, 1843. The act was passed on the 5th of April, 1843, and was promulgated on the 11th day of April. The defendants' answer was filed on the 1st day of May, 1843. The law was in full force before issue joined.

And we are not aware of any principle of law, or statutory provision, which excludes suits pending from the operation of a statute, which does not impair the obligation of the contract it seeks to enforce; and, although we think that we do not stand in need of the statute of 1843 to support our defence, yet we cannot help thinking that we are entitled to the benefit of it.

The 2d section is full to our purpose. It applies to all banks, whether in liquidation or not.

It cannot be confined to property banks: 1st, because its language is general and its meaning clear; 2d, because the Legislature could not mean to grant such a privilege to the debtors of banks, for whose capital the state was bound, and deny it to those of the banks in which it had no interest, or liability, and which, under the provision of the 27th section of the act of the 14th of March, 1842, might revert to, and remain under the management and administration of their own stockholders.

The Com'rs of the Exchange & Banking Co. of New Orleans v. Mudge and another.

MORPHY, J. This suit is brought to recover \$6500, being the amount of two months' rent of the property known under the name of the St. Charles Hotel, which the defendants occupy under a lease from the Exchange and Banking Company, bearing date the 20th of April, 1840. By this lease, which is for the term of five years, the defendants bind themselves to pay rent at the rate of \$26,000 per annum, payable in eight monthly instalments, commencing on the 10th day of November, and ending on the 10th day of July in each year. The rent sued for is alleged to have accrued between the 10th of January, and the 10th of March, 1843. The defence is, that at the time the rent claimed became due, the defendants were, and still are the holders and owners of certain notes or obligations in writing of the Exchange and Banking Company, commonly called bank notes, issued by the said Bank under and by virtue of its charter, and which did, and now form a part of its circulation, to an amount equal to the rent demanded, which notes the defendants annex to their answer, and plead in compensation to the claim of the petitioners, to whom the said notes were tendered in payment, and who refused to receive them. There was below a judgment in favor of the plaintiffs, from which this appeal has been taken.

The plea of compensation set up by the defendants is resisted on the ground of the presumed insolvency of the Bank from the fact of its having been placed in liquidation, on the 15th of March, 1842, by virtue of a decree of the District Court of the First District. This presumption seems to be drawn from the different clauses of the act providing for the liquidation of banks, which in many respects assimilate the powers, duties and liabilities of the commissioners to be appointed, to those conferred or imposed on syndics of insolvent estates, and prescribe the same proceedings as those provided by the acts relative to the voluntary surrender of property. From the provisions of the act of 1842, it does not follow, that a bank which goes voluntarily, or is forced into liquidation, is, as a matter of course, to be considered insolvent. It may forfeit its charter by violating some of its provisions, without being in a state of legal insolvency, *i. e.*, without being unable to pay its debts. Were the insolvency of a bank to be presumed in all cases of voluntary or forced liquidation,

The Com'rs of the Exchange & Banking Co. of New Orleans v. Mudge and another.

the presumption, in many instances, would be contrary to the true state of the case. Two of our real estate banks have forfeited their charters and been forced into liquidation, for having suspended specie payments, or otherwise violated their charters. Although in winding up their affairs the stockholders may sustain heavy losses, it cannot be said that these banks are insolvent; and there are but few who doubt their ultimate ability to pay all their debts. In the present case, the record does not inform us whether the stockholders of the Exchange and Banking Company have paid up the full amounts of their subscriptions. It is only when the whole amount of the capital stock of a bank, together with its assets, is insufficient to meet its liabilities, that a bank can be said to be insolvent. However this may be, there is no evidence whatever before us of the insolvency of the Exchange and Banking Company, save the presumption relied on by the petitioners, but which, in our opinion, does not necessarily result from the mere fact of its having been put in liquidation. In no part of the law of 1842, is the insolvency of a bank contemplated as a cause for the forfeiture of its charter, or for placing it in forced liquidation.

The first section of that act declares, "that whenever any bank of this State, located in the city of New Orleans, by any *act, omission, or violation of law*, shall have incurred the forfeiture of its charter," &c., referring generally to any violation of its charter, which may take place although the bank have ample means of meeting ultimately all its liabilities. The 26th section provides, that "as soon as the commissioners shall have paid off all the debts of the corporation committed to their charge, they shall distribute any balance that may remain in their hands among the stockholders thereof, rateably, according to the number of shares held by each," &c. The above and other provisions of the law of 1842, show, that it was not contemplated by the Legislature that the banks placed in liquidation would, in all cases, be insolvent, and that they should be treated as such. The fact of insolvency may or may not exist when a bank forfeits its charter, and is, in consequence thereof, placed in a state of liquidation. Until such insolvency is shown, there can be no good reason why all debts due to such a corporation should

The Com'rs of the Exchange & Banking Co. of New Orleans v. Mudge and another.

not be compensated with, and extinguished by its obligations, or notes, held by its debtors. It was probably to obviate all difficulty on this subject, that the same Legislature which passed the law took occasion to provide, in an act passed at the same session, (Acts of 1842, page 454,) "that nothing contained in the act to provide for the liquidation of banks, or other laws of the State, shall be so construed as to deny to any persons having notes to pay in banks in liquidation, the right of paying said notes in the bank notes of said liquidating banks." From this provision it might be inferred that the Legislature did not consider the banks put in liquidation in the light of declared and actual insolvents, otherwise they would have created a privileged class of creditors, by giving to persons holding their notes, the right of paying with them *at par*. Although this law speaks only of *notes*, into which form almost all the debts to banks are thrown, a liberal and fair construction should extend it to all debts due to the banks not evidenced by notes. If, in the present case, the Exchange Bank had taken the defendants' notes for the several instalments of the lease, as we understand is frequently done, the right of the latter to pay them in the notes of the Bank could not be questioned. The accident of no notes having been required by the Bank, should not, perhaps, deprive the defendants of this right. But whatever doubts may have been entertained in consequence of the words of this proviso, they have been removed by the Legislature by inserting in a law of the 5th of April, 1843, a provision which may be considered as declaratory of their former intention. This provision is to be found in the second section of the last mentioned act, and is in the following terms: "It shall be the duty of each of the banks of the State, at all times, to receive in offset, or part offset of *debts* due to it, its own debts when liquidated or past due, whether for circulation, deposits, or arising from any other source whatever, and whether such banks *be or be not in liquidation*, and without reference to the date at which the debtor offering such tender may have acquired the claim by him offered in offset." The terms of this law are general, and apply to all the banks of the state, whether in liquidation or not, to those which still retain their charters, as well as to those which have lost theirs, and are in a train of liquidation. These provisions of law, while

The Com'rs of the Exchange & Banking Co. of New Orleans v. Mudge and another.

they protect and uphold the circulation of the liquidating banks, which was in some degree a duty on the part of the State under whose sanction it had become a part of the currency of the country, tend greatly to facilitate their liquidation, and to produce ultimate solvency, by inducing many to pay debts which would otherwise perhaps have been lost to the banks. The plea of compensation should, we think, have prevailed.

It is, therefore, ordered that the judgment of the District Court be avoided and reversed; and proceeding to render such judgment as, in our opinion, should have been given below, it is further ordered and decreed that compensation be, and it is hereby allowed, to the amount of the rent claimed, on a surrender being made to the petitioners, of the bank notes tendered to them by the defendants. The costs of both courts to be paid by the plaintiffs and appellees.

SAME CASE—ON A RE-HEARING.

No law of this State in existence before 1842 defined the insolvency of a corporation, or provided for its voluntary or forced liquidation. The acts of the 14th, and 26th March, 1842, and 5th April, 1843, apply alike to solvent and insolvent banks, and whether their liquidation be forced or voluntary. They are special laws, for special purposes, and are to be construed together, as *in pari materia*. To them alone, we must look for the mode of proceeding, and for the powers and duties of the commissioners of liquidation. The Legislature intended by these acts to provide specially for the holders of the notes of the banks in the course of liquidation, and to make the circulation of each bank a good offset to debts due to it. These statutes made it the duty of the commissioners to allow such offsets, and they violate no vested right, nor impair the obligation of any contract.

BULLARD, J. A re-hearing was granted in this case, and we have attentively considered the arguments urged against the opinion first pronounced by this court, allowing the compensation.

It is said that the Bank was insolvent, and that the insolvency is abundantly shown by the record, and is, indeed, notorious; and

The Com'rs of the Exchange & Banking Co. of New Orleans v. Mudge and another.

that the administration of the liquidating banks is to be conducted in the same way as in cases of ordinary insolvency.

To this we may answer, that no law of this State existed previously to the year 1842, which defined the insolvency of a corporation, or provided for either its voluntary or forced liquidation. We are not informed by any law what shall constitute the insolvency of a bank or other joint stock incorporated company; and no mode of liquidating corporations was established by law previous to the acts of 1842 and 1843, which apply alike to solvent and insolvent banks, and whether the liquidation be forced or voluntary. We are, therefore, to look to those acts, and to them alone, for the mode of proceeding, and for the powers and duties of the commissioners. They are special laws, for special purposes, and are all to be taken and construed together, as laws *in pari materia*.

The 24th section of the act of 1842, entitled "an act to provide for the liquidation of banks," declares, "that in all matters *not herein specially provided for*, the powers, duties and liabilities of the commissioners shall be the same as those conferred or imposed on syndics of insolvent estates, and the proceedings the same as those provided by the acts now in force relative to the voluntary surrender of property."

Now the act approved March 26th, 1842, entitled, "an act to amend an act entitled an act relative to the banks of this State," &c., contains a remarkable exception to the rule which governs the administration of insolvent estates. It provides that nothing contained in the act to provide for the liquidation of banks, or other laws of the State, shall be so construed as to deny to the persons having notes to pay in banks in liquidation, the right of paying said notes in the bank notes of said liquidating banks, except when said notes may have been transferred to the other banks as security for receiving the circulation."

The second section of the act of 1843, (approved April 5th,) entitled an act to facilitate the liquidation of the property banks, &c., extends this exception still further, and makes it the duty of each of the banks of the State, at all times, to receive in offset or part offset of debts due to it, its own debts when liquidated and past due, whether for circulation, deposits, or arising from any

Gordon v. Dreux and another.

other source whatever, and whether such banks be or be not in liquidation, and without reference to the date at which the debtor offering such tender may have acquired the claim by him offered in offset.

These actions contain other exceptions to the rule which prevails in the administration of insolvent estates. The 18th section, for example, provides that whenever a distribution is to be made by the commissioners, they shall make a reservation of funds equal to one-third of the amount of the outstanding notes in circulation for at least one year after the filing of the tableau, exclusive of the notes held by banks bound to take up a part of the notes of the liquidating banks.

It appears to us, therefore, clear, that the Legislature intended to make special provision for the bill holders, and to make the circulation of the bank always a good offset to debts due to the liquidating banks. The justice or policy of particular laws does not concern the judicial department; but it would appear but just, that those who had received bank notes as money, under the sanction of the Legislature, should be particularly favored.

The objection that the law is retroactive, would have more force, perhaps, if urged by other creditors of the bank. As it relates to the commissioners, it is enough to say, that the statutes make it their duty to allow the offset, and that they violate no vested right, and do not appear to us to impair the obligation of contracts.

The judgment rendered remains undisturbed.

ALEXANDER GORDON v. ADELIN DREUX and another.

Defendants sued as maker and endorser of a note, severed in their defence. There was a judgment in favor of the plaintiff against the maker, but against him as to the endorser; and he appealed from the latter alone. On a motion to dismiss the appeal, on the ground that the maker of the note was not made a party to the appeal: *Held*, that defendants having severed in their defence, and their interests being distinct, it was unnecessary to cite a party who had no interest in the matter in controversy between his co-defendant and the plaintiff.

It is no ground for dismissing an appeal from a final judgment, that the record does

Gordon v. Dreux and another.

not contain testimony, not reduced to writing, taken in support of an exception of the other party, the judgment sustaining which was acquiesced in by the appellant, and had its effect.

The first section of the act of 13 March, 1827, authorizing notaries, or others acting as such, by a certificate added to the protest of a note, or bill, &c., to state the manner in which notices of protest were served or forwarded, and declaring that a certified copy of such certificate shall be evidence of all the matters therein stated, applies to acts done by the notary in his official capacity, and, therefore, within the territorial limits of his authority as such. But where an act was done by him, such as serving a notice of protest, in a parish in which he had no capacity to act, the same degree of faith and credit is not given to his written and unsworn statement. In such a case he should be sworn and examined as an ordinary witness, as he must be considered to have acted unofficially, and not under his oath of office.

In an action against the maker and endorser of a note, the defendants excepted to the action as premature, on the ground that the amount claimed by plaintiff was not yet demandable; as the latter, after the maturing of the note sued on, by a special agreement with the drawer, for a consideration received from him, had granted him a certain time within which to pay the note, which delay had not yet expired. The exception was sustained. After the expiration of the delay, the plaintiff obtained a judgment by default, which was set aside, the defendants filing separate answers, and the endorser urging that he had been discharged by the delay. There was a judgment against the maker, but in favor of the endorser. On appeal: *Held*, that though the fact of granting the delay was shown, the exception having been pleaded by both defendants, proved that the endorser knew that the delay had been granted, and consented to it, and that, having enjoyed the benefit of the plaintiff's indulgence, he is not discharged.

APPEAL from the District Court of the First District, *Buchanan, J.*

Bodin, for the appellant. In this case the question arises, whether a Notary can give an official attestation of a fact occurring out of the place of his jurisdiction, when it is his own act to which he certifies?

The presumption that the notary served the notice himself, since he certifies it under his oath, is not destroyed. The question is simply as to the sufficiency of the proof, not as to the existence of the fact, which stands uncontradicted. Can he give an official certificate of the fact, so as to supersede the necessity of his appearance in Court as a general witness? Is his certificate a sufficient proof of itself?

If a protest, and a certificate of protest, were authentic acts, the question would perhaps be answered in the negative; because

the rule seems to be, that an authentic act is proof, *per se*, of all agreements and facts accomplished *tempore instrumenti gesti*.

But a certificate of notice of protest, under our statute of 1827, is not an authentic act. 10 La. 209. It is a notarial attestation, to which the act gives full credit, merely on account of the faith and confidence due to an official oath, the witnesses being required only to attest the entry on the records of the Notary. See 16 La. 564.

Notaries cannot, surely, be called upon to give such official attestations out of the parish for which they have been commissioned; because, out of its limits, their capacity ceases. "*Il leur est defendu d' instrumenter, c'est à dire de recevoir des actes hors de leur ressort.*" Toullier, Vol. 8, No 72.

But which is the instrument which requires their competency? It is clearly the protest itself. If the demand of payment is to be made in the parish of Orleans, a Notary Public of that parish must be used. The residence of the maker or acceptor settles the jurisdiction, no matter where the notices of protest are to be served. The notices to endorsers, and the certificate of service of those notices, are but an accessory to the principal act or main instrument. Who is to perform the accessory? The Notary who made the demand and protest. And his certificate of "the manner in which any notices of protests to drawers, endorsers, or other persons interested, were served or forwarded, will be evidence of the matters therein stated." Act. of 1827, § 1.

Nothing but the fact of incompetency can invalidate the certificate of a Notary. That competency, in the case of the protest of a bill or note, depends upon the residence of the drawers, that is, on the place where the demand and protest are to be made. The moment that he is seized with jurisdiction over the principal matter, his capacity is vested to complete any other accessory act, and his certificate must be held to be valid, if it attests no act but his own.

Another construction of the statute of 1827, would render it, in many instances, inapplicable to our distant parishes. Suppose a protest is to be made by a Notary, or Parish Judge, of a distant and yet thinly populated county, where no post office is yet established. After protesting the bill, notices are prepared to be forwarded to an endorser living in the city. What will the Notary

do? Shall he cross the line of his parish to deposite in the adjoining post office, the letter or notice directed to the endorser? If there is no post office within his own parish, the notice must not be sent at all; or rather, if sent by him, there shall never be any official attestation of it, because the line of jurisdiction has been crossed, in order to forward the notice; and the Notary cannot testify out of his certificate, a fact performed by him out of his jurisdiction.

Such cannot have been the legislative intent. It might be true, even in relation to authentic acts, which prove, *contra omnes*, only such agreements and facts as are the objects of the contracting parties, that in some cases they are evidence of matters accomplished, out of the notarial jurisdiction of the officer. For instance, the statute requiring Notaries to give written notice to the members of family meetings, to attend at their office on the day appointed by the order of court. Some of those members may be residents of a neighboring parish within a radius of thirty miles. Yet the fact of the letter having been carried by the Notary himself may be attested. He can send it by private conveyance, and certify it to have been sent in that manner. But if he does it himself, why should not his certificate be as good?

In the same way, the Notary who has protested a bill, is bound to give or send notice to the endorsers. The statute of 1827 has not changed the mercantile law. The notice may be sent by private conveyance, or by mail. If he puts the notice in the post office, the Notary's certificate is good, because it certifies his own act. If the notice is sent by private conveyance, the certificate of the Notary is not good, because it contains the attestation of an act done by another than himself; but if he carries the notice himself, or crosses the parish line to put the notice into the letter box, these being his own acts, his certificate should have full faith and credit, because his competency has at once been vested as to any act or fact in relation to the protest, by the place of the demand, or residence of the maker.

Bartlett, contra. The appeal should be dismissed: *first*, for the want of necessary parties; *secondly*, because the record does not contain all the evidence introduced below. *Dorsey v. Harding et al.* 1 Robinson, 32. *Bell v. Morrison*, 1 Ib. 543.

Gordon v. Dreux and another.

The State v. Cook, 16 La. 237. *Johnson v. Spearing*, 15 Ib. 252. Ib. 435. 19 La. 91.

SIMON, J. This is a suit against the drawer and endorser of a promissory note. The defendants filed an exception, stating that the action was prematurely instituted, and the claim set up against them not yet demandable, inasmuch as the plaintiff, after the maturity of the note sued on, by special agreement with the drawer, for certain considerations received from said drawer, gave him time to pay the note, to wit, a delay of sixty days, which has not yet expired, and until the expiration of which, the plaintiff agreed not to proceed to enforce the payment of the note. The defendants prayed for a dismissal of the action.

After hearing the testimony adduced by the defendants, this exception was sustained by the court, *a qua*, which ordered, that the suits should be continued for sixty days from the day of the protest of the note sued on. This judgment was acquiesced in by the plaintiff, who took no appeal therefrom. After the expiration of the delay, the latter moved the court for a judgment by default against the defendants.

The defendants severed in their answers to the merits. The drawer of the note pleaded want of consideration; and the endorser, after pleading want of notice, averred that if he ever was indebted to the plaintiff as endorser, his liability has been released in consequence of the plaintiff having given time to the drawer of the note, without his, the endorser's, consent or knowledge.

On these issues judgment was rendered below in favor of the plaintiff against the drawer of the note, and against him in favor of the endorser, from which the plaintiff has appealed.

A motion has been made to dismiss this appeal on two grounds:

First. That all the necessary parties are not before the court, as one of the defendants, the drawer of the note, has not been made a party to the appeal. *Second.* That the record does not contain the evidence on which the case was tried.

I. This suit was brought against the defendants, *in solido*, and judgment was obtained by the plaintiff against one of them. The plaintiff appealed from the judgment rendered against him in favor of the defendant, who was released from the obligation declared upon in the petition; and we are unable to see any good

reason why he should have appealed from a judgment rendered in his favor. The defendants had severed in their defences before the inferior court; their interests were distinct and separate; and it seems to us, that there was no necessity to bring before us a party who had no interest in the matter in controversy between his co-defendant and the plaintiff. The judgment appealed from, and complained of, does not concern, in any manner, the drawer of the note.

II. The evidence upon which the merits of this case were tried, is all contained in the record. It is true that the testimony of several witnesses who were examined in support of the defendants' exception, was not taken down in writing, and is not copied in the record; but the judgment rendered thereon has had its effect, having been acquiesced in by the appellant, who only complains of the final judgment rendered on the evidence which was adduced on the trial of the cause below, after issue joined by the defendants; and it is the correctness of the latter only which we are called upon to examine.

On the merits of the defence set up by the appellee, the case presents two distinct questions:

First. Is the notice of protest sufficiently proved to have been given to the endorser, by the Notary's stating in his certificate that the same was *delivered to said endorser himself*, when it appears that if it were so delivered by the Notary, the latter must have done so out of his parish? or, in other words, can a Notary give an official attestation of a fact occurring out of the place of his jurisdiction, when it is his own act which he certifies? *Second.* Was the delay granted by the court, *a qua*, to the defendants, in sustaining their exception, consented to by the plaintiff, without the consent and knowledge of the appellee?

I. The Notary states in his certificate, that "the parties to the note were duly notified of the protest, by letters to them *by me* written and addressed, served on them respectively in the manner following, viz: by delivering the one for F. Roy to himself," &c.; and from an admission found in the record, it is established, that on the 1st of April, 1843, (the day on which the notice was served on the endorser,) the defendant, F. Roy, was confined to his house in the parish of St. Bernard by sickness. Hence, it is necessari-

Gordon v. Dreux and another.

ly inferred that the Notary, having served the notice himself, must have crossed over the parish line in order to make a personal service on the defendant; and it is contended that the official certificate of the fact showing the personal service of the notice, supersedes the necessity of his appearance in court as a witness, and that such certificate is a sufficient proof of itself.

Under the statute of the 13th of March, 1827, (Bullard & Curry's Digest, p. 43,) Notaries, or persons acting as such, are authorized, by a certificate added to their protest, to state the manner in which any notices of protest to drawers, endorsers, &c., were served or forwarded; and wherever they shall have done so, a certified copy of such certificate shall be evidence of all the matters therein stated. We understand by this law, that whenever a Notary, in his official capacity, and, therefore, within the extent of his jurisdiction as such, has done any act going to show the manner in which notices of protest were served, or forwarded, the statement thereof contained in his certificate shall have the same effect, as proof, as though the fact were proved by his testimony given under oath. For instance, if the notice is deposited in the post office by the Notary and forwarded by mail, or served personally by him upon an endorser, or in any other manner, within the limits of his jurisdiction, his statement of such facts, from the credit which the law attaches to the acts of such officers performed under their official oath, shall be believed, and no other proof shall be required. But we are not prepared to say, if the act performed is done by him in a parish in which he has no capacity to act, that the same degree of faith and credit should be given to his written and unsworn attestation. In the latter case, he should be sworn and examined as an ordinary witness. Here, when the Notary served the notice on the endorser personally in the parish of St. Bernard, his capacity was suspended. He made such service as any other individual would have done. He was not acting under his oath of office. He was out of his legal jurisdiction; and it seems to us, that if we were to permit him to attest this fact officially after his return to his office, and to give effect, as evidence, to his official statement of an act by him performed in a parish in which he was incompetent, it would be recognizing, and even vesting Notaries, with such powers as our Legislature never

Gordon v. Dreux and another.

can have contemplated. We are of opinion that the evidence of notice, furnished in this case, by the production of the Notary's official certificate, is insufficient; and that on this ground, the plaintiff should have been nonsuited.

II. An affirmative answer to this question, would go to the absolute discharge of the endorser; and this is the ground upon which judgment was rendered below, against the plaintiff, in favor of the appellee. The latter contends that time was granted to the drawer of the note, without his consent and knowledge; and the judgment of the inferior court sustaining the exception, is referred to as evidence of the fact. It is true that sixty days were allowed to the defendants before filing their answer to the merits, in consequence of the agreement alleged in their exception, that is to say, because the facts therein stated were satisfactorily proven; but the exception was set up by both defendants, who joined in the same plea, and it is no where stated in the exception that such time was given by the plaintiff without the consent or knowledge of the appellee. They both say that the suit was prematurely instituted; they both claim the benefit of the time alleged to have been agreed upon between the plaintiff and the drawer; and both aver that until the expiration of the delay allowed, the plaintiff cannot proceed to enforce the payment of the note sued on, which, they both say, is not yet due or *payable*. This exception, which was sustained, clearly shows that the appellee not only knew that the delay claimed had been allowed by the plaintiff, but that he had also consented to its being granted. He knew it so well, that he made use of the same plea, and obtained the postponement of the suit for sixty days. Far from making opposition to the delay, he enjoyed the benefit of the plaintiff's indulgence, without suggesting in any manner that it had been allowed without his knowledge and against his consent; and we must come to the conclusion, that the appellee is not entitled to his discharge.

It is, therefore, ordered, that the judgment appealed from, which is hereby affirmed, be so modified as to be in favor of the appellee as in case of nonsuit, with costs in the lower court, those in this court to be borne by the appellee.

Twichel v. Andry and wife.

TIMOTHY C. TWICHEL v. HORTAIRE ANDRY and wife.

The insolvency of a husband, who has made a surrender of his property, does not deprive him of his marital power, of appearing in court to assist his wife, nor prevent his being made a defendant for that purpose. C. P. 118.

Plaintiff, a builder, having erected certain houses on lots belonging to the husband of the appellant and a third person, the wife intervened in a notarial act of settlement between the builder and her husband, and his co-proprietor, for the purpose of renouncing her legal mortgage on her husband's property. It was stipulated by the act, that certain notes should be given by the husband and his co-proprietor, for a balance of the price due to the builder, which were executed and identified with the act; and the builder's privilege was expressly reserved to the amount of the notes. The appellant having subsequently obtained a judgment of separation of property, ascertaining her rights, levied a *fi. fa.*, on all the property of the husband, and, among the rest, on his undivided half of the lots on which the buildings were erected. The whole was adjudicated to the appellant, who, in part payment of the price, assumed to pay the amount of the note sued on, *as due to the builder by privilege in his favor resulting from a building contract*. In an action against the wife for the amount of the note: *Held*, that though the debt originated in a contract of the husband's for improving his own property, the price of the property purchased at the Sheriff's sale, was the consideration for which she assumed to pay the debt, which was contracted for her private benefit; (C. P. 683, 706, 707;) that the stipulation in the act was for the benefit of a third person, who, by the institution of the suit, consented to avail himself of the advantage stipulated in his favor; (C. C. 1884. C. P. 35;) that plaintiff acquired under the stipulation, the right of exercising his privilege on the property subject thereto, and also of enforcing his claim against the appellant personally; and that there should be judgment for the plaintiff.

A third possessor, personally liable for the debt, is not entitled to the exceptions which one not so bound, might oppose to the creditor's hypothecary action, and cannot relinquish the property mortgaged. C. C. 3366, 3368.

APPEAL from the City Court of New Orleans, *Collins, J.*

Wharton, for the plaintiff.

Castera, for the appellant.

SIMON, J. The plaintiff seeks to recover the sum of \$750 with interest, alleged in the petition to be due, *in solido*, by the defendants, who are husband and wife, upon a note subscribed by the husband, to the order of William Debuys, and endorsed by the latter; the amount whereof appears, on the face of the note, to be secured by privilege on certain buildings, according to the stipulations contained in a notarial act which was duly recorded, and in consideration of which buildings, the same was executed.

The wife first pleaded, that being a married woman, she could not appear in court without the authority of her husband, or of the court. On this exception, the Judge, *a quo*, conceived that, although the suit was brought against both husband, and wife, it was proper that he should authorize the wife to make her defence without the assistance of her husband; and he gave an order accordingly.

She answered to the merits by pleading, that she is not in any manner indebted to the plaintiff; that the debt sued on was contracted by her husband during the marriage; that whether separated in property from him or not, she cannot bind herself for her husband, or conjointly with him, for debts contracted by him before or during the marriage; and that she is separated in property from her co-defendant. She also avers, that having become the purchaser of her husband's property, she can only be prosecuted by an hypothecary action; that her husband is in insolvent circumstances; and that no action can be maintained against herself, until a syndic be legally appointed.

Judgment was rendered below against the wife for the amount sued for, with privilege as prayed for in the petition; from which judgment she has taken this appeal, with the assistance and authorization of her husband.

The record contains a bill of exceptions, in which it is stated, that the appellant objected to going into the trial of this cause, on the ground that her co-defendant having applied for the benefit of the insolvent laws of this State, can no longer be a party to the suit, and that she is, therefore, not authorized and assisted by him as required by law. This objection was overruled by the court, *a qua*, and the case ordered to be tried, to which opinion of the inferior court, her counsel excepted.

The insolvency of the appellant's husband and co-defendant, appears to have been taken for granted, for there is no evidence in the record to show it, except a document entitled a "Schedule of the affairs of H. Andry." But, supposing him to have become insolvent during the pendency of the suit, this could not preclude him from appearing in court to assist and authorize his wife. This insolvency did not deprive him of the marital power, and he could still be made, or kept in court, as a party defendant

for that purpose. Code of Practice, art. 118. 4 La. 258. Here, however, besides the assistance of her husband, upon whom a citation had been served, there was also the authorization of the Judge, granted in consequence of the appellant's exceptions; and we are unable to perceive the object of her counsel in objecting to proceed to the trial, unless he wished that his client should be assisted by the syndic of her husband's estate, to whom the law gives no such authority. The objection was properly overruled.

On the merits, the record discloses the following facts: H. Andry and Wm. Debuys entered into a building contract with two undertakers, who agreed to build three houses or stores on three lots of ground belonging to said Andry and Debuys, for a certain sum of money, to be paid at certain periods mentioned in their notarial contract, for a part of which, by an authentic act of settlement subsequently passed with the undertaker, the owners of the lots gave two notes of \$750 each, (one of which is the note annexed to the plaintiff's petition,) with an express reservation of the builder's privilege on the three stores, to the extent of the notes and interest. The notes were accordingly identified with the act, by being paraphed *ne varietur*, by the notary. The appellant had intervened in this act for the purpose of renouncing her legal mortgage on her husband's property.

Several months afterwards, the appellant having obtained a judgment of separation of property against her husband, in which her rights were liquidated at a very large amount, issued an execution against him, which was levied on all his property, and among others, on his undivided half of the three lots, on which the three stores had been erected, and which were subject to the builder's privilege. All this property was offered for sale by the Sheriff, and adjudicated to the appellant for the sum of \$5400, in part payment of which she assumed the payment of the sum of \$750, (the amount of the note sued on,) due to the undertaker, secured by privilege in their favor resulting from a building contract, &c., so that she became personally bound to pay the amount sued for, as part of the price or consideration of the property purchased by her at the Sheriff's sale. At that time, the note sued on was under protest, being endorsed by Wm. Debuys, and by the plaintiff, who claims the amount thereof as his property.

From the answer filed by the appellant, the defence appears to be twofold: *First*, That she is not bound to pay the amount claimed, as she could not bind herself for her husband, or conjointly with him, for a debt contracted during the marriage.

Second, That as the purchaser of her husband's property, she could only be proceeded against as a third possessor, by an hypothecary action.

I. This debt was not contracted by the appellant for the benefit of her husband or of the community. It is true, it originated from a contract entered into by the husband for the purpose of improving property which belonged either to him or to the community; but the consideration for which she assumed to pay the debt, was the price of property by her acquired at the Sheriff's sale, and which, under articles 706 and 707, of the Code of Practice, she became bound to pay to the privileged creditor, as a part of the price of the adjudication. The plaintiff's privilege was preferable to the appellant's legal mortgage; nay, she had even renounced her mortgage in favor of the then holder of the note sued on. She knew that the debt must be satisfied first; and, in assuming the payment thereof, she did nothing but what any other individual purchaser of property at a Sheriff's sale would do, in discharge of the price of the adjudication. This debt was contracted by the appellant for her private benefit. Under art. 688 of the Code of Practice, she had a right to bid for the property seized and offered for sale, on the same terms as any other person. The proceedings had in obtaining her judgment against her husband, in issuing the execution, and in carrying the sale into effect, were had under the authority of the Judge, before whom her suit had been instituted, her husband's interest in the same being adverse to hers; and it is obvious that she cannot keep the property by her purchased, without paying the price thereof. Art. 2412 of the Civil Code, does not apply to such a case.

II. This ground of defence is also untenable. As we have already said, the appellant having assumed the payment of the note sued on, became personally bound to pay the amount thereof as a part of the price of the adjudication of the property purchased at the Sheriff's sale. It was a stipulation made for the benefit of a third person, who by the institution of this suit, consents to

The Second Municipality of New Orleans v. The Orleans Cotton Press Company.

avail himself of the advantage stipulated in his favor. Civil Code, art. 1884. Code of Practice, art. 35. It is clear, that the plaintiff has not only acquired the right, under the stipulation, of exercising his privilege on the property subject thereto, but also of enforcing his claim against the appellant personally. 2 La. 135. 4 Ib. 238. 5 Ib. 316. 18 Ib. 42. It is well known, that a third possessor who is personally liable to pay the debt, is not entitled to the exceptions which he might otherwise oppose against the creditor's hypothecary action, and cannot relinquish the property mortgaged. Civil Code, art. 3366 and 3368.

Judgment affirmed.

THE SECOND MUNICIPALITY OF NEW ORLEANS v. THE ORLEANS
COTTON PRESS COMPANY.

Under an ordinance of the Council of the Second Municipality of New Orleans, which had been in force for several years, a fixed annual tax was levied on the assessed value of the real estate within the Municipality. In the month of December it was ascertained that the revenues of the Municipality would be insufficient to discharge its debts; and an ordinance was passed laying an additional tax for the year ending with that month, and for the succeeding year. In an action to recover the increased tax for the year just expiring: *Held*, that no period of the year being fixed by law when the tax shall be laid, the retrospective operation of the ordinance is no proof of its illegality.

The fifth section of the act of 10th March, 1834, relative to the powers of the Mayor and City Council of New Orleans, and the ordinance of the Second Municipality of that city, of December, 1838, require a notification to the tax payer, before he can be made liable for interest at the rate of eight per cent a year, on the taxes due by him. Where he has not been put in default, interest can be recovered only from judicial demand.

APPEAL from the Commercial Court of New Orleans, *Watts, J. Rawle*, for the plaintiffs.

R. N. and A. N. Ogden, for the appellants.

GARLAND, J. This is a claim for municipal taxes levied on the landed estate of the Company, being \$600 for the year 1838, the like amount for the year 1839, and the sum of \$1500 for the year 1840, with interest at eight per cent per annum, on each of these sums, from the time they became due or demandable.

The Second Municipality of New Orleans v. The Orleans Cotton Press Company.

The answer is a general denial.

It is admitted, that since the institution of the suit, each of the sums of \$600 has been paid, leaving the question of interest open for decision, by consent of parties. The Court gave a judgment for \$1500, with interest thereon at eight per cent per annum, from the 1st of January, 1841; and allowed the like interest on one of the sums of \$600 from the 1st of January, 1840, until paid, saying nothing about the interest on the other sum of \$600, alleged to have been due on the 2d January, 1839. From this judgment the defendants have appealed.

It is alleged, in the first place, that the plaintiffs cannot recover more than \$600 for the taxes of the year 1840, and that the ordinance passed on the 15th of December, 1840, laying an additional tax of three dollars on every one thousand dollars of the assessed value of real estate for the years 1840 and 1841, is, so far as it relates to the year 1840, retroactive, unauthorized, and contrary to law.

The power of the Municipal Council to lay taxes on lands and slaves within its limits, is, we suppose, unquestionable. This power seems not to have been denied; and no law is shown to have existed, at that time, which limited the discretion in the exercise of the power. An ordinance had existed for a number of years, laying an annual tax of two dollars on each thousand dollars, of the assessed value of real estate within the limits of the corporation, with certain exceptions. Under this ordinance the tax of \$600 for the years 1838 and 1839 was claimed, and the justice of the demand is not denied, so far as regards the principal; nor is it denied that \$600 of the tax of 1840 is due under the same ordinance. It is proved that in the month of December, 1840, there was a deficiency in the funds of the Municipality, its debts exceeding its yearly income. The Council thereupon passed an ordinance laying an additional tax as above stated, whereby the taxes on the property of the defendants were increased from six to fifteen hundred dollars. It is this increase on the taxes of the year 1840 that is resisted.

The power to levy a tax is undeniable; no limitation of the power is shown; nor does it appear, that any period of the year is fixed at which the tax shall be laid. Towards the close of the

The Second Municipality of New Orleans v. The Orleans Cotton Press Company.

year 1840, the Council finding the revenue of that year and the succeeding one, insufficient to pay the debts and future expenses of the municipal government, levied an additional tax, which is alleged to be retroactive, illegal, and contrary to the original and fundamental principles of a free government. What these last have to do with the question, we do not well understand. Taxation, as we understand it, is an arbitrary power, to be exercised when expedient, and is indispensable to the preservation of the faith and credit of states, and municipal corporations. The advocates of civil liberty have contended, that it should be inseparable from representation, and uniform in its operation; and it does not appear, that either of those principles has been violated in the case before us. As to the alleged retrospective operation of the ordinance, we think the argument is fully met, and refuted, by the opinion given in the case of *Oakey v. The Mayor et al.* 1 La. 1, which was written by one of the most distinguished jurists of our State and country, whose recent decease has caused universal regret.*

* The late ALEXANDER PORTER. The subjoined notice of the death of this gentleman, appeared in the Bulletin newspaper of the 31st of January, 1844, from the pen of JUDGE BULLARD, who succeeded, in January, 1834, to the seat on the bench of the Supreme Court left vacant by the resignation of Judge PORTER.

OBITUARY.

A wide void has been created by the death of ALEXANDER PORTER. One who has known him intimately during the greater part of his brilliant career, who admired his genius and his energy of character, and who, in common with the rest of the community, sincerely laments its untimely termination, cannot permit the occasion to pass away without putting upon record his testimony of his worth, not in the common place language of indiscriminate eulogium, but in terms dictated by truth and candor.

The subject of this notice was born in Ireland, in 1785, and consequently was but a boy when the same political calamities which drove an EMMETT and a SAMPSON, and many others, to our shores, deprived him of a father and a country. He sought refuge from the storm, and found a home in the United States. He was at first destined to mercantile pursuits; but fortunately was permitted to follow the bent of his own inclination, and, with an early education somewhat neglected, he embraced the profession of the Law. Having prepared himself for admission to the bar in Nashville, where he had resided

The Second Municipality of New Orleans v. The Orleans Cotton Press Company.

In the second place it is contended that the court erred, in allowing interest on the sums claimed by the plaintiffs at the rate of eight per cent per annum from the time specified.

since his arrival in America, he came to Louisiana in 1810. He settled himself in Attakapas; and such was the energy of his character, and the charin of his manners and conversation, that in a parish peopled at that time almost exclusively by inhabitants of French origin, and speaking only that language, he was elected two years afterwards a member of the Convention which formed the present Constitution of this State. He was one of its most active and distinguished members; and many of his efforts, in which he put forth the most glowing and fervent eloquence, are yet remembered by the survivors of that body.

We have said, that the early education of Mr. PORTER was imperfect. After he commenced the practice of the law in this State, by a constant persevering self-culture, he made himself sufficiently acquainted with Latin, French, and Spanish, to gain access to all the treasures of legal learning. It must not be forgotten, that at that time the Spanish law was in force in Louisiana, co-existing with a code in itself imperfect, and calculated to bewilder the researches of the student and the practitioner. He made himself so well acquainted with the Spanish Law and its history, as to furnish that analysis of the Spanish Codes or positive law, which is to be found in the appendix of one of the volumes of Wheaton's Reports.

From 1810 till 1820 the range of practice of Mr. PORTER embraced the counties of Attakapas, Opelousas, and Rapides. He was always distinguished, not only for the enthusiasm and ardor of his character, and his impassioned eloquence, but for the joyous hilarity of his conversation in society; always replete with humor, wit, and anecdote, "which set the table on a roar." Such a combination of qualities gave him, not only extensive popularity, but great influence, throughout that district.

On the retirement of Judge DERBIGNY, in 1820, Mr. PORTER was appointed his successor as one of the Judges of the Supreme Court of this State. His appointment, though a very young man, gave general satisfaction to the profession. From that time until the end of the year 1833, the Supreme Court was composed of GEORGE MATTHEWS, whose sound judgment, unerring sagacity, and instinctive sense of equity, were universally admitted; of FRANÇOIS XAVIER MARTIN, the only survivor—the Nestor of our jurisprudence, equally distinguished for singular acumen and extensive and varied learning—and ALEXANDER PORTER.

It was a period remarkable in our judicial annals, in the course of which the law itself underwent great changes, by the amendments of the Civil Code and the enactment of the Code of Practice, and the final abrogation of the Spanish law, in 1828. These changes added much to the labors of the Bench;

The Second Municipality of New Orleans v. The Orleans Cotton Press Company.

The fifth section of the act of the Legislature, passed in 1834, explaining the extent of the powers of the corporation of New Orleans, provides that, "in default of payment of the said taxes, within the period which shall be prescribed by the City Council, the Mayor, &c., are hereby authorized to bring suit, before any

and, while they ultimately simplified our jurisprudence, produced perplexing difficulties in the comparison of the old with the more recent enactments. The Code of Practice, especially, was a most perplexing innovation. The task imposed upon the Court was performed with discrimination and ability. It was also during that period that the most important decisions were rendered on questions of the conflict of laws, and that branch of international jurisprudence was greatly illustrated by the labors of the Supreme Court of Louisiana. It cannot be expected that this notice of the deceased should furnish anything like an analysis of those decisions, but it is proper to say that Judge PORTER devoted the whole energies of his mind to the discharge of his official duties, and was remarkable for the full and able development of every question he was called upon to discuss.

In December, 1833, he was elected a Senator in the Congress of the United States, and resigned his seat on the Bench. He was far from being one of those politicians by trade, who have an eternal, morbid hankering after office, and who are always thrusting themselves forward whenever any office becomes vacant, which their selfish ambition suggests to them to solicit. On the contrary, his views were liberal and enlarged, and he entered the Senate with a high reputation already formed, as a jurist and a man, and he soon gave proof that he was a statesman of no ordinary stamp. The Senate was at that time composed of the most eminent men in the nation, and it is enough to say, that he distinguished himself as an able and ready debater, even in a body composed of CLAY, WEBSTER, CALHOUN, PRESTON, CLAYTON, and a host of others. His career as a Senator, though brilliant, was not long. Before the end of his term he retired from public life, and devoted himself to literary and agricultural pursuits, until he was again elected to the Senate in January, 1843, without any solicitation on his part, and even in his absence from the seat of government. Under this new appointment he never took his seat. A disease, which his friends have always attributed to the severe labors of the Bench, terminated ultimately in *hydrothorax*, which put an end to his earthly career on the 13th of January last.

There are few examples of men like ALEXANDER PORTER, who, by the unaided energies of their own minds, triumphant over the disadvantages of early fortune, and in a foreign land, without the aid of family connections, emphatically artificers of their own fortunes, have so eminently adorned the land of their adoption, and more than repaid the debt of gratitude to the country by which they were so generously received, honored and beloved.

The Second Municipality of New Orleans v. The Orleans Cotton Press Company.

court of competent jurisdiction, against all who are in default for said taxes, together with eight per cent interest on the amount thereof, from the day on which the same fell due, or ought to have been paid." B. & C. Dig., p. 118. In December, 1838, the Municipal Council passed an ordinance directing the treasurer, on the first day of January in each year, "to commence the collection of the taxes for the past year, after giving ten days previous notice in two of the newspapers of the city, in English and French; and that he institute suits against all persons who fail to pay said taxes within ten days after notification, for the amount of the tax, including interest at the rate of eight per cent per annum, from the date of notification." The statute and ordinance clearly contemplate a notice to the tax payer, before he is made liable for interest at the rate of eight per cent per annum. The statute provides that suits may be instituted "against all who are in default for said taxes," together with interest, &c. The ordinance declares that the treasurer must give ten days previous notice of his commencing to collect the taxes, and that he shall institute suits against all who fail to pay within ten days after notification, for the amount of the tax and interest from the date of the notification. In this case there is no evidence of a notification, in the newspapers, or in any other mode. The tax payer has not been put in default, and is not liable for the interest, at the rate claimed, until the institution of this suit.

It is, therefore, ordered, that the judgment of the Commercial Court be annulled, and that the Second Municipality do recover of the Orleans Cotton Press Company the sum of \$1500, with interest thereon, at the rate of eight per centum per annum, from the ninth day of December, 1841, the day of judicial demand, until paid; and also the sum of sixteen dollars, the amount of interest, at the rate aforesaid, on the sum of \$600, from the date of judicial demand until the time said sum was paid; the appellee paying the costs in this court, and those of the court below to be paid by the appellant.

THE STATE V. ALEXIS PLAZENGIA and another.

The surety in a recognizance for the appearance of a party at a particular term of court, will be liable on his bond, though no proceedings were had against the principal at the term at which he was recognized to appear, where an order was made at that term continuing all cases not disposed of, and, at the succeeding term the principal failed to answer, and the surety failed to produce his body, when called upon to do so.

APPEAL from the District Court of Assumption, *Nicholls, J.*

Beatty, District Attorney, for the State.

Isley, Nicholls, and Connelly, for the appellant.

MARTIN, J. The defendant, Daniel Smith, is appellant from a judgment against him, on a recognizance for the appearance of A. Plazengia, at the May term, 1842, of the District Court of the Second District, in which he is the surety of Plazengia. His counsel has urged, that judgment was improperly given on the recognizance at the October term, 1842, no proceedings having been had at the May term, at which Plazengia was bound to appear. The record shows, that at this last term an entry was made on the minutes of the court, for the continuance of all causes not disposed of; and the Attorney for the State has urged, that the case of the State against Plazengia and his surety, not having been acted upon at that term, was legally continued until the next session of the court, when Plazengia was regularly called. On the failure of the latter to answer, his surety, the present appellant, was called upon to produce the body of his principal; and, on his failing to answer, the judgment appealed from was correctly given, against both the principal and surety, *in solido*. It does not appear to us that the court erred.

Judgment affirmed.

JEAN BAPTISTE DAIGLE and Wife v. JEAN BRUZZÉ.

On the sale of land, it was stipulated that the price should be paid in instalments at future periods, but the act was silent as to interest. In an action for the price, with interest from the day of sale: *Held*, that the property producing fruits, the vendor is entitled to interest, but only from the maturity of the instalments. C. C. 2531.

APPEAL from the District Court of Lafourche Interior, *Deblieux*, J.

MORPHY, J. The defendant, who has appealed from an order of seizure and sale rendered upon an act importing a confession of judgment, assigns as error apparent on the face of the record, that the order was issued for a larger sum than that purporting to be due by the authentic act annexed to the petition. The record shows, that a mortgage was retained by the plaintiffs on an *arpent* of land, sold by them to the defendant on the 8th of September, 1836, to secure the price thereof, amounting to \$450, which was stipulated to be paid, one-third in all March, 1837, one-third in all March, 1838, and one-third in all March, 1839. On this evidence the plaintiffs prayed for, and the Judge allowed legal interest on the whole price from the day of sale, and the notice of seizure to the defendant issued accordingly. This is clearly erroneous. As the property sold was one producing fruits, the vendor was entitled to interest, but only from the maturity of the instalments. Civil Code, art. 2531.

It is, therefore, ordered that the judgment of the District Court be reversed, and that the tract of land described in the plaintiffs' petition be seized and sold to satisfy their claim, with legal interest on \$150 from the 31st of March, 1837, on \$150 from the 31st of March, 1838, and on \$150 from the 31st of March, 1839, with costs below, those of this court to be paid by the plaintiffs and appellees.

Thibodeaux and *Cole*, for the plaintiffs.

Beatty, for the appellant.

Lejeune v. Hébert.

ROSELINE LEJEUNE v. VALENTINE HÉBERT.

A partial payment, before prescription acquired, will interrupt the prescription.

Neither the parties, nor their heirs, nor the witnesses to the act by which a mortgage is stipulated, can take advantage of its non-inscription during the first ten years from its date (C. C. 3316 ;) but it will cease to have effect, even as to them, after that period, if not inscribed before its expiration. C. C. 3333.

The plea of prescription is one of those peremptory exceptions, which, without going to the merits of the cause, show that the plaintiff cannot maintain his action, and may be pleaded specially in every stage of the action, previous to final judgment. Such exceptions raise no issue on the merits. Thus where a judgment by default has been set aside on filing a plea of prescription, and the exception is overruled, the case cannot be tried on its merits, until put at issue by an answer, or by a judgment by default, regularly entered, after the overruling of the exception. C. P. 345, 346.

APPEAL from the District Court of West Baton Rouge, *Dibieux, J.*

SIMON, J. The plaintiff's claim is founded upon a conventional mortgage, executed by authentic act, passed on the 24th of March, 1829, for the purpose of securing the payment of the sum of \$1538 80, acknowledged by the defendant to be due to the three minor children of Landry Allain, being the amount of their portion in the succession of their deceased mother. The plaintiff, as one of the heirs, claims the sum of \$512 66, with six per cent interest per annum thereon, according to the stipulations of said act, from the 1st of April, 1829, until paid; and prays that the property mortgaged may be seized and sold to satisfy her demand.

The defendant pleaded the prescription of ten years against the plaintiff's demand and mortgage, alleging that the mortgage is extinguished for want of inscription.

On this issue the case was tried; and evidence having been adduced by the plaintiff to prove a payment of \$75, made on account of her claim, about two years before the institution of this suit, the defendant produced no proof, and judgment was rendered below in favor of the plaintiff for the sum claimed, with a credit of seventy-five dollars, ordering the same to be recovered with mortgage on the property described in the petition; from which judgment, after having vainly attempted to obtain a new trial, on

the ground that the case could not be legally tried on its merits, as there was no issue joined, or answer filed on the merits, the defendant has taken this appeal.

From the evidence adduced it appears, that the act of mortgage sued on, was executed on the 24th of March, 1829, and that, at the time this suit was instituted, (26th October, 1843,) the plaintiff was thirty-two or thirty-three years of age. It has not been shown, that the act of mortgage was inscribed in the book of conventional mortgages kept by the Judge of the parish where the property is situated, before the expiration of ten years from its date; so that more than fourteen years had elapsed between that date, and the filing of the plaintiff's petition, without its having ever been inscribed.

The defendant's counsel has contended: 1st. That the plea of prescription should have prevailed, the debt having been created more than ten years previous to the institution of this suit.

2d. That the Judge, *a quo*, erred in giving effect to a mortgage which was extinguished by the lapse of time, it not having been inscribed, according to law, before the expiration of ten years from its date.

3d. That the new trial applied for should have been granted; as, after overruling the plea of prescription, the case should have stood before the court for an issue to be made on the merits, either by an answer or judgment by default.

I. The prescription as to the debt itself, was interrupted by the partial payment made by the defendant, previous to its having been acquired. The evidence shows that the payment was made on account of the debt sued on, and was so made at the request of plaintiff's husband, in whose name, as the witness states, he applied to the defendant for a horse, in part payment of what was due to the plaintiff. This was consented to by the defendant; the horse was selected by the witness; the value thereof was agreed on between him and the defendant to be \$75; and the horse was delivered in part payment of the debt sued on. This amounts to an acknowledgment of the debt on the part of the defendant, sufficient to interrupt the prescription, as the plaintiff, though

Lejeune v. Hébert.

emancipated by marriage,* could not be prescribed against, but by ten years from the age of majority.

II. This question was presented to our consideration in the case of *Minor v. Alexander*, (ante, p. 166,) in which, after a full investigation of the point, we held, that although, under art. 3316 of the Civil Code, neither of the contracting parties could take advantage of the non-inscription of a mortgage, still it was necessary, under art. 3333, in order to preserve its effect after the expiration of ten years, that the act in which the mortgage is stipulated, should be inscribed in the manner prescribed by law. We said, that so long as ten years had not elapsed, the mortgage should continue to have its effect between the contracting parties, without inscription; but that such effect should cease after that period, if the act was not inscribed before its expiration. This construction of the two articles, which, at first blush, appear inconsistent and contradictory, gives effect to both; and as we have no reason to be dissatisfied with our first opinion on this subject, and as, in this case, more than fourteen years had elapsed since the execution of the mortgage, without its having been inscribed, we must again hold, that its effect had ceased, and that the property became free from the incumbrance, long before the institution of this suit.

III. The record shows, that a judgment by default had been entered against the defendant, and that it was set aside by the filing of his plea of prescription. This plea was one of those peremptory exceptions, which, the law says, *without going into the merits of the cause, show that the plaintiff cannot maintain his action*, and may be pleaded specially in every stage of the action, previous to final judgment. Code of Practice, arts. 345, 346. Such exceptions do not present any issue on the merits; and although, under art. 336, the defendant must plead in his answer, all the peremptory exceptions on which he intends to rely, or

* The plaintiff in this case was of full age before her marriage. *Mathurin Lejeune*, a witness examined on the trial, testified, that she was then about thirty-three or thirty-four years of age, and that it was about four years and eleven months since she was married.

which he is bound to plead expressly and specially, we understand, that such exceptions being distinct from the merits of the cause, the defendant cannot be precluded from answering to the merits, after the overruling of his peremptory exceptions so expressly and specially pleaded; and that the case cannot be tried on its merits, unless it be put at issue by an answer, or by a judgment by default, regularly entered, after the exceptions are overruled. This is in accordance with our decision in the case of *Lang v. Kimball*, 15 La. 200, and with several other decisions, in which this court has held, that a judgment rendered, without issue joined upon the merits, or without a judgment by default, is irregular. 7 Mart. N. S. 285. 8 Ib. N. S. 297, 300. Here, the Judge, *a quo*, could not, after having tried the exception only, render a final judgment on the merits of the case, without allowing the defendant to join issue, or without a judgment by default having been taken against him. We think that the new trial should have been granted, for the purpose of proceeding according to law.

It is, therefore, ordered, that the judgment of the District Court be annulled and reversed; that the plea of prescription filed by the defendant, as it regards the personal action, be overruled; that the said plea, as it relates to the effect of the non-inscribed mortgage declared on in the petition, be sustained; and that this case be remanded for further proceedings, according to law; the plaintiff and appellee paying the costs of the appeal.

R. N. and A. N. Ogden, for the plaintiff.

Labauve, for the appellant.

MARIE CONSTANCE HÉBERT v. VALENTINE HÉBERT.

APPEAL from the District Court of West Baton Rouge, *Deblieux*, J.

R. N. and A. N. Ogden, for the plaintiff.

Labauve, for the appellant.

SIMON, J. This action, based upon the act of mortgage which was the subject of our decision in the case of *Lejeune v. Hébert*,

Hébert v. Hébert.

just decided, was instituted to recover one-third of the sum therein acknowledged to be due by the defendant, to the heirs and minor children of Landry Allain. The defence consists in a plea of the prescription of ten years, against the personal action and against the mortgage; and in a plea of payment of several sums, which, it is alleged, the plaintiff received at different periods, on account of the demand sued on. Judgment was rendered below against the defendant for the amount sued for, subject to the several credits established by the receipts by him produced, and giving effect to the mortgage by which the debt was originally secured. The defendant has appealed.

The evidence shows, that the plaintiff's first husband, in whose right she sues as tutrix to his minor children and heirs, was not of age until the 8th of September, 1834; and that several payments were made to him, and to his widow, at different periods, to wit, in 1836, 1837 and 1838. This action was instituted on the 26th of October, 1843; and it is clear, that the personal action was not prescribed at the time of the institution of suit.

On the question whether effect should be given to the mortgage after the expiration of ten years, although not inscribed as required by art. 3333 of the Civil Code, we refer to the case just decided, in which we held, that such effect had ceased, and that the property was disencumbered long before the institution of this suit. So it must be in the present case.

It is, therefore, ordered, that the judgment of the District Court, so far as it allows to the plaintiff the amount sued for, with interest at six per cent until paid, subject to the credits and deductions therein mentioned, be affirmed, with costs in the lower court; that it be reversed and avoided as to the mortgage therein recognized; and that the costs of this appeal be borne by the appellee.

JOHN A. KEY v. AUSTIN WOOLFOLK.

Bricks, made by the former owner, not to be used on the place, but for sale, and lying there at the time of a Sheriff's sale of the premises, are moveables, and not included in the adjudication of the land to the purchaser. C. C. 459, 460, 464, 465, 468.

APPEAL from the District Court of Iberville, *Deblieux, J. Edwards*, for the plaintiff.

Labauve, for the appellant, cited Civil Code, arts. 497, 2449, 2466, 3256. 16 Duranton, p. 232. Pothier, Coutumes d'Orleans, vol. 1. art. 47. Ib. Vente, art. 47. Grenier, Hypoth. vol. 1. 295—7 Troplong, Hypoth. 2 vol. art. 399. 3 Toullier, art. 122. Persil, Hypoth. vol. 1, p. 272, arts. 3, 4, 5.

MORPHY, J. The petitioner sues for the value of a certain quantity of bricks, a part of which, he alleges, was sold to the defendant, and the balance forcibly taken away from his brick kiln by the defendant, and converted to his own use. This claim is resisted on the ground that, at a Sheriff's sale made on the 4th of March, 1843, in virtue of an order of seizure and sale issued against Key, the defendant became the purchaser of his land on bayou Grosse Tête, and acquired, with the premises, all the improvements and appurtenances thereunto belonging, of which the brick kiln situated on the land was a part. There was a judgment below in favor of the plaintiff, from which this appeal was taken.

We think, with the inferior Judge, that the bricks which were on the land of the plaintiff at the time it was sold by the Sheriff and purchased by the defendant, did not pass to the latter with the land, as an accessory to it. They do not appear to have been made immoveable, by being attached to the soil, nor to have become so by destination. On the contrary, the evidence shows that these bricks were not made to be used on the place, and that the plaintiff had been selling them to different persons previous to the Sheriff's sale. They were, therefore, not included in the adjudication of the land to the defendant. Civil Code, arts. 459, 460, 464, 465, 468. It is shown that ten thousand of these bricks

Cox v. Camp.

had been taken off the land by the defendant, previous to his purchase ; and his overseer states, that he had told the plaintiff that he would buy all the bricks that the former could make. After the sale, the defendant took off and used in the construction of chimneys for his negro cabins, an additional quantity of 45,000 bricks. The Judge below allowed the plaintiff \$10 per thousand, the price at which it was known that bricks were selling in the neighborhood. This allowance is said to be too large, as one witness, (the defendant's overseer,) states, that he would not have been willing to give for those bricks more than five dollars per thousand, as they were very brittle and made of loam. The evidence shows, that the plaintiff had sold some of the bricks at \$10 per thousand, and that \$10 was the price he was asking for them. The persons employed by the defendant to build the chimneys of his negro cabins were examined on the trial, and do not represent the bricks as being of a very inferior quality ; but, be that as it may, the defendant has surely no cause to complain, when in a case of trespass, he is made to pay the same price which other purchasers were paying to the plaintiff for his bricks.

Judgment affirmed.

ANN BARNS COX v. ROBERT C. CAMP.

Defendant claimed to be the owner of a slave under a notarial act of sale, executed to him on the 26th of March. Plaintiff, cited in warranty as the representative of the alleged vendor, offered in evidence a letter from the defendant to the latter, dated in that month, the day not mentioned, in which, after stating that he has not title to a sufficient number of negroes to obtain a loan which he desired, he requests the alleged vendor "*to send him an act of sale for the slave*" sued for "*for the present.*" Held, that this was a counter-letter, showing that there was no sale as between the parties.

APPEAL from the District Court of Iberville, *Deblieux, J.*
McHenry, for the plaintiff and warrantor.
Labauve, for the appellant.

BULLARD, J. The plaintiff sues for a slave named Miles,
VOL. VI.

which she claims as her separate property ; and the defendant sets up title under an act of sale from her late husband, Nathaniel Cox, whose estate the plaintiff administers ; and she is, in that capacity, called in warranty. It is clearly shown, that the slave belongs to the plaintiff, and that she has never consented to his alienation ; and the only question which the case presents is, whether there was a real sale by Cox to the defendant, so as to render his estate liable in warranty. The plaintiff had a verdict and judgment, and the defendant has appealed.

The defendant gave in evidence a copy of an act passed before Christy, a notary, purporting to be a sale of the slave Miles, signed by Cox alone, for \$700, cash ; and it appears, that a copy of the act was forwarded to the defendant in Iberville, where his plantation is situated, and where the negro was at the time. In order to show that this act was simulated, that in truth there was no sale, and no price paid, the plaintiff gave in evidence a letter from the defendant to Nathaniel Cox, dated March, 1835, (on the 26th day of which month the act was passed,) in which he informs him of the progress of his negotiations with the bank for a loan of money on mortgage, and that his business was all agreed to, with the exception of the negroes, and adds : " As I have not title for all the negroes offered to insure a sufficient amount, and as Abraham is not here, I wish you would *send me an act of sale for Miles* for the present, &c. If you wish it, I will release him from the mortgage as soon as I can arrange the title of some I have."

This is clearly a counter-letter, and shows that, as between the parties, there was no sale, but that their intention was, that Camp should have a nominal title so as to enable him to mortgage the slave temporarily to the bank.

But it is contended, that certain expressions in letters written by Cox, to the defendant, show that his intention was to make a *bona fide* sale. In the first, in which he mentions having forwarded a copy of the act of sale of Miles, he says : " This sale for Miles may be considered permanent, as I surely shall never take him into the house again." The other letter bears date before the act of sale, and merely announced that Cox, had sent a box containing Miles' clothes, who, it would seem, had been sent up

Hagan v. Hart.

previously, and who, he says, "is never more to see New Orleans, as my property. Therefore consider him as destined for the plantation all his life."

Admitting that it may have been the intention of Cox, to sell Miles, and never to take him back into his house, yet there is no evidence that Camp so understood it at that time, much less, that he ever paid or engaged to pay the price set forth in the act of sale. It appears that Cox died in 1836, and that the defendant was largely indebted to him at that time. The parties had had many business transactions together, and it does not appear that the defendant was ever charged with the price of Miles. Nothing shows that the two parties concurred as to the price of the slave, or that a sale, which was manifestly simulated at first, became a serious one afterwards, by mutual consent.

Judgment affirmed.

JAMES HAGAN v. AARON HART.

Though the Code of Practice (arts. 395, 397, 617, 629,) provides that the execution of a judgment belongs to the court which rendered it, and that an opposition, by which a third person pretends to be the owner of the thing seized, must be made before the court which gave the judgment, or issued the order of seizure; yet, where a plaintiff sets up title in himself to a slave, shown to be worth more than three hundred dollars, and bases his injunction, or opposition, on his right of ownership, a question is presented which no Parish Court, except that of the parish of Orleans, can try, the jurisdiction of such courts being limited, (C. P. 128,) and no provision having been made for an appeal from their decisions to the Supreme Court. Such a case is, *ex necessitate rei*, an exception to the rules laid down for ordinary cases. Art. 397 must be considered as only applicable to those cases in which the value of the property seized is within the jurisdiction of the court issuing the execution; in other cases the opposition, or injunction, which the Code of Practice, (art. 393,) considers a separate demand, even when brought before the court which granted the order of seizure, must be taken into a court having jurisdiction co-extensive with the right claimed.

It is not necessary that a Parish Judge, in granting an injunction in the absence of the District Judge, should direct in his order into what court it is to be made returnable. It is the duty of the clerk to issue the writ according to law.

APPEAL from the District Court of Iberville, *Deblieux, J.*

MORPHY, J. The defendant having obtained a judgment against John Hagen, in the Parish Court of Iberville, levied an execution on a slave named Martha, which he was about to sell to satisfy his judgment, when he was arrested by an injunction, sued out of the District Court, on the ground that the slave seized was not the property of the debtor, but that of the plaintiff, James Hagan, who had purchased her at Vicksburg, in October, 1841, for the sum of \$425. A motion to dissolve the injunction was made, on the following grounds, to wit:

First. That the court was without jurisdiction, and could grant no injunction to stay an execution that had issued from the Parish Court.

Second. That the order of injunction was defective, because having been granted by the Parish, in the absence of the District Judge, it was not made returnable to the Fourth Judicial District Court, as required by law. The motion to dismiss having prevailed, the plaintiff appealed.

1. It is true that the Code of Practice provides that the execution of judgments belongs to the courts which rendered them, and that an opposition by which a third person pretends to be the owner of the thing seized, must be made before the court which gave the judgment, or issued the order of seizure. Arts. 395, 397, 617, 629. But the plaintiff sets up title in himself to a slave, shown to be worth more than three hundred dollars, and bases his injunction, or opposition, on his right of ownership; thus a question is presented which the Parish Court cannot try, that court being one of limited jurisdiction. Art. 128. Even could the plaintiff have gone into that court under the circumstances, and have tried his title there, no provision is made by law for appeals from the Parish Court to this tribunal. Were the articles of the Code of Practice on this subject to be rigidly and inflexibly adhered to, they would produce a failure of justice, and exhibit the strange anomaly in our jurisprudence, of existing rights without corresponding remedies to enforce them. A case like the present must, *ex necessitate rei*, form an exception to the rules laid down for ordinary cases. The reasons for introducing an exception in this instance are as strong, if not stronger, than those presented in *Lawes et al. v. Chinn*, 4 Mart. N. S. 390, which induced this

Wilson v. Craighead, Tutor.

court to make an exception, "to prevent an immediate injury which could not otherwise be warranted off." The property being seized in a parish distant from that in which the judgment had been rendered, the only way of preventing a failure of justice, is to consider the rule laid down in article 397, as applicable only to cases where the value of the property seized is within the jurisdiction of the court issuing the execution, and to permit the litigation growing out of the opposition to be taken into a court having jurisdiction co-extensive with the right claimed. By this means no injustice is done, while the rights of all parties interested can be tested in the opposition or injunction suit, which the Code considers as a separate demand, even when brought before the court which granted the order of seizure. Art. 398. Such was the view this court took of the matter, in a later case, somewhat analogous to this. *Terry v. Terry et al.*, 10 La. 77.

II. In relation to the second point, we have already had occasion to say, that it was not indispensably necessary that the Judge, in giving his *fiat*, should direct that the writ should be returnable in a particular court; but that it was the duty of the clerk to issue the writ according to law. 1 Robinson, 43. He does not appear, in this case, to have acted in violation of any provision of law.

It is, therefore, ordered that the judgment of the District Court be reversed, the motion to set aside the injunction on the grounds filed overruled, and the case remanded for further proceedings; the appellee paying the costs of this appeal.

Labauve, for the appellant.

Edwards, for the defendant.

ALEXANDER WILSON v. JOHN B. CRAIGHEAD, Tutor.

The emancipation of a minor under the provisions of the acts of 23 January, 1839, and 25 February, 1837, gives him all the power over his property and rights, of a person of full age. He may, consequently, ratify any act of partition or compromise effected by his tutor during his minority; and the ratification will cure all defects in the original transaction. C. C. 1869, 2225, 2252.

Where an emancipated minor, joins with his co-heirs in an act of settlement and partition of the succession of his mother, and accepts his portion as ascertained thereby

Wilson v. Craighead, Tutor.

and there is no evidence that the settlement did not embrace all the property of the succession, he will be concluded by it.

A tutor who has received nothing, and could not have received any thing for his minor, having had nothing to act upon, has no account to render.

APPEAL from the Court of Probates of Iberville, *Dutton, J. Grymes*, for the appellant.

Edwards and Labauve, for the defendant.

SIMON, J. The object of this action is to compel the defendant, who, it is alleged, was the plaintiff's former tutor, to render an account of his administration as such. The petition alleges, that during the plaintiff's minority, certain successions were opened in his favor as forced heir, to wit: that of his deceased mother, of the value of \$62,338, his interest or virile share of the inheritance being *one-sixth of the estate*, or \$10,389 40; and that of his deceased grandmother, of the value of \$264,105, in which his interest or virile share was *one-sixth of one-eighth of the said sum*, or \$5555 55. That one D. D. Chesnut was appointed his tutor on the 2d of April, 1834, and died, the defendant having been subsequently appointed his tutor, on the 10th of April, 1838. That the defendant neglected to cause to be rendered any account whatever of Chesnut's tutorship, and has also neglected to render any account whatever of his own tutorship of the petitioner's estate; has never taken care of his (plaintiff's) person, education, or estate; and has never taken any active part in the affairs of his ward, except by his participation with others in conniving to defraud the plaintiff, and to deprive him of his rightful inheritance for his, (said tutor's) benefit, &c.; by which, plaintiff has sustained damage to the amount of \$20,000. Wherefore, he prays that the defendant be ordered to render an account, and be made responsible to him; and that he may be decreed to pay him the said sum of \$20,000, the amount of the interest accruing to him from the several successions aforesaid.

Before issue was joined, the plaintiff filed a supplemental petition, in which, after stating divers additional causes of action against his tutor, and giving a statement of various articles of personal and real property and slaves, belonging to the successions of his father, and of his grandfather, and mother, in the States of Louisiana and Tennessee, in which he was interested for his

Wilson v. Craighead, Tutor.

virile portion, and of which he was deprived during his minority, he increases his demand against the defendant, to the sum of \$40,000, for which he prays judgment, &c.

The answer of the defendant, filed on the same day that the supplemental-petition was presented and filed, pleads, first, the prescription of four years, between the date of the judgment by which the plaintiff was dispensed from the time necessary to attain the age of majority, and the institution of this suit. It pleads, also, the general issue; gives a detailed statement of the plaintiff's affairs, and of the manner in which his property was disposed of; denies that defendant ever received any part of the plaintiff's estate, or is responsible for any thing; and concludes by praying that this suit be dismissed: 1st, because all demands of the petitioner, as stated in his petition, are prescribed; 2d, because the plaintiff is, and was, for a long time in possession of all his property, rights and credits; and, 3d, because the defendant never had, and has not as yet, any thing to account for to the plaintiff. The answer of the defendant to the supplemental petition, is to the same purport.

On these issues, the inferior court proceeded to investigate the alleged rights of the plaintiff; and judgment having been rendered thereon in favor of the defendant, the plaintiff appealed.

It appears from the evidence, that the plaintiff's mother was duly confirmed, and qualified, as his natural tutrix, on the first of November, 1825. She died on the 3d of January, 1834, and D. D. Chesnut was then appointed tutor. After the death of the latter, the defendant was appointed tutor of the plaintiff, on the 10th of April, 1838. While Chesnut was acting as tutor, a certain act of compromise was passed between the heirs of Lavinia Erwin, (the plaintiff's grandmother,) and of Joseph Erwin, sr., and Joseph Erwin, jr., purporting to be a liquidation and settlement of the said successions. This act was executed on the 6th of April, 1837, with the consent and intervention of the plaintiff's tutor, D. D. Chesnut, who appeared therein as one of the parties representing the minor, Alexander Wilson, the present plaintiff. The result was, as to the plaintiff, that his portion in said estates was established and ascertained to be the sum of \$4000, "*being the amount which will fall to each of the minor heirs of Eliza*

Wilson v. Craighead, Tutor.

Erwin deceased, out of the successions of Joseph and Lavinia Erwin, said sum to be paid in three equal instalments, at one, two, and three years," &c. On the 29th of April, 1837, an act of exchange was passed between Chesnut and wife, and William E. Edwards and wife, from the stipulations of which, it appears, that said Edwards and wife bound themselves to pay to the plaintiff, the amount accruing to him from the act of compromise and settlement above mentioned, putting themselves in the place and stead of Chesnut and wife, in all matters and things, liabilities, and obligations by the latter contracted in the said act of compromise, and exonerating them fully and entirely from all such obligations and liabilities. On the 10th of April, 1838, the defendant was appointed tutor, and proceeded to institute a suit against the estate of the former tutor for a rendition of the account of tutorship, which account having been rendered by the widow, was opposed by the defendant, and said suit and opposition were yet pending and undetermined, when, on the 6th of December, 1838, after due and legal proceedings had before the Court of Probates, the plaintiff was, by a decree of that court, dispensed from the time prescribed by law for attaining the age of majority. On the 4th of April, 1839, by an authentic act passed before Louis Petit, a notary public, the plaintiff then dispensed with the time prescribed by law for attaining the age of majority, acknowledged that he had received of William E. Edwards the sum of \$4066 66, as the amount coming to him from the estates of Jos. Erwin and Lavinia Erwin, and of Joseph Erwin, junior, under the act of compromise and settlement above mentioned; ratifying, confirming, and making valid the said act of compromise and partition, as also the act of exchange and sale made between Chesnut and wife, and Edwards and wife, passed on the 29th of April, 1837; and selling, transferring and conveying to said Edwards, all the rights, titles, interests and demands which he has, or may have had, in and to the said successions, previous to the passing of the said acts of compromise, partition, exchange and sale.

The evidence further shows, that on the 20th of January, 1843, the succession of the plaintiff's mother was settled between the heirs, by an act of settlement and partition, passed before the Judge of the parish of Iberville, in which the plaintiff appeared

as one of the heirs in his own right, and in which his portion or share was ascertained and liquidated, independently of the amount of the sale of the plantation previously adjudicated to one Stone. The amount of the plaintiff's share was by him taken in property.

As to the other claims set up by the plaintiff in his supplemental petition: The evidence shows that the plaintiff's mother sold, and conveyed to Joseph Erwin, a large number of slaves for cash; that this was done whilst she was his natural tutrix; and it does not appear by any evidence that the defendant ever had in his possession any property belonging to the plaintiff, or that he ever received any money for him, during the existence of the tutorship.

From the facts disclosed by the record, we cannot hesitate to say, that the plaintiff's claim is unfounded, and that the defendant, without its being necessary to pronounce any opinion upon his plea of prescription, is entitled to his discharge.

First. Because the plaintiff, after having been legally dispensed from the time prescribed by law for attaining the age of majority, took possession of his estate; received the amount of the share or portion accruing to him from the successions of his grand-father and grand-mother, and of Joseph Erwin, jr.; ratified the acts which had been made during his minority, and transferred all his rights to another person, for a good and valuable consideration.

Second. Because the plaintiff, after having acted personally in the settlement of his mother's estate, received his portion therefrom, and accepted said succession as it was. And

Third. Because it is not shown that the defendant ever had in his possession any property or funds belonging to the plaintiff; and because the defendant cannot be made responsible for the acts of the plaintiff's mother and natural tutrix, whose succession said plaintiff accepted.

I. The plaintiff, under the act of the 23d of January, 1829,*

*By the act of 1829, the power of emancipating minors was conferred on the District Courts only. By an act of 25 February, 1837, it was extended to the Courts of Probate.

(Bullard and Curry's Digest, p. 582,) was dispensed from the time prescribed by law for attaining the age of majority. The judgment of the Court of Probates, rendered on his application, and on the advice of a family meeting, had the immediate effect of vesting him with the capacity which the law recognizes in persons of full age; and he was thereby enabled to conduct his own affairs and administer his estate, in the same manner as if he had attained the age of twenty-one years. This doctrine has already been recognized by this court, in the case of *Harman et al. v. McCawley*, in which it was held, that "*an emancipation thus obtained, gives to the minor all the powers over his property and rights which appertain to a person of full age.*" 9 La. 571. The language of the law upon which that opinion is based, is too clear to require or admit of any further comment.

The plaintiff having thus acquired a full capacity to act, was at liberty to ratify the act of compromise and partition consented to by his tutor during his minority. This he did, by receiving from Edwards the amount to which he was entitled under the act, and transferring to him all his hereditary rights for the consideration therein expressed. He must be bound by his act, which has the effect of curing all the defects which may have existed in the original transaction. Civil Code, arts. 1869, 2225, 2252. 2 La. 519. 2 Robinson, 2. 3 Ibid. 256. He had, therefore, nothing to claim against the defendant, as proceeding from the successions which were the subject of the act of compromise and partition thus subsequently ratified, as he had put himself in possession of all that he could ever pretend to obtain, after his transaction with Edwards.

II. Nothing shows that the settlement of the succession of the plaintiff's mother, which was made in 1843, does not contain all the property and effects belonging thereto; nay, the amount thereof, added to the sum of \$42,000, which proceeded from the sale of the plantation, makes an aggregate of \$69,300, of which he received his share, while the amount declared upon in the petition only shows \$62,338. This part of the plaintiff's demand is clearly unjust.

III. The defendant cannot be made answerable for any act of the plaintiff's mother, during the natural tutorship; as from the

Thomas, Administrator, v. Bourgeat, Executor.

plaintiff's having accepted her succession purely and simply, it necessarily results, that he would be bound towards himself, as one of the heirs, for the consequences of the tutorship. Supposing that she illegally sold to her father slaves belonging to her children, a fact which is far from being established, how can it be pretended that the defendant is to be made liable in damages? If such damages were allowed, would not the plaintiff, as one of the heirs, be immediately made responsible for them? No claim was set up by the plaintiff against his mother's estate, on account of the tutorship, at the time that the settlement thereof was made. This part of his demand is too absurd to be for a moment countenanced. As to the other allegations in the supplemental petition, no proof has been adduced to sustain them; and every thing shows that the plaintiff's pretensions on this score, are unfounded and imaginary.

Upon the whole, we agree with the Judge, *a quo*, in the opinion, that the plaintiff has failed to make out any part of his case. It is not shown that the defendant, during the short period of his administration, received anything, or ever could have received anything for his pupil. No proof has been adduced from which fraud or neglect could even be inferred; and as this court said, in 4 La. 136, the tutor having received nothing, and having had nothing to act upon, has, therefore, no account to render.

Judgment affirmed.

DAVID THOMAS, Administrator of the succession of James Williams, deceased, v. AUGUSTIN BOURGEAT, Dative Testamentary Executor of James H. Mill, deceased.

The right to proceed by a rule to show cause, or on motion, implies the pendency of a suit between the parties, and is confined to incidental matters, arising in the progress of the contestation, except where a summary proceeding is expressly allowed by law.

The administrator of an estate is amenable, during his lifetime, to the Probate Court from which he derives his authority; but where he dies without having rendered an account, it can be rendered only in the Probate Court in which his own estate is

Thomas, Administrator, v. Bourgeat, Executor.

being administered. But a claim of the person who afterwards became administrator against his intestate, acquired before he became administrator, must be prosecuted before the court in which the succession of the intestate was opened.

APPEAL from the Court of Probates of Pointe Coupée, *E. Cooley, J.*

Merrick, for the plaintiff.

Stevens and *T. J. Cooley*, for the appellant.

BULLARD, J. This case was before us in March, 1842. See 1 Robinson, 403.* The judgment of the Court of Probates was then reversed, and judgment rendered, subject, however, to the same restriction as relates to the Brandon debt, as that contained in the judgment below. A credit of \$1107 61, claimed by the defendant as a payment made by his testator, Mix, for Williams, to the Canal Bank, was rejected; reserving, however, to the defendant, the right of claiming from the estate of Williams, the plaintiff's intestate, that amount, if any such right he had. After the mandate from this court had been entered on the minutes of the court below, the defendant, Bourgeat, took a rule on the plaintiff to show cause, why the credit of \$1107 61 should not be allowed, as well as the sum of \$685, being what is called the Brandon debt.

To this rule the plaintiff excepted, on the ground that the judgment of the Supreme Court was final, and that the cause was not sent back for a new trial; that the succession of Williams being opened in the parish of West Feliciana, all actions and claims for money against it must be brought before the Court of Probates of that parish; that the Court of Pointe Coupée is without jurisdiction, except as to the execution of the judgment of the Supreme Court; and that the proceeding was begun without a petition, and was irregular and unwarranted by law.

The court below sustained this exception, and discharged the rule; and the defendant, Bourgeat, has appealed.

The Court did not err. The judgment rendered in the case by

*The appeal in this case, reported in 1 Rob. 403, is printed, by mistake, as having been taken from the Parish Court of Pointe Coupée. It was from the Probate Court of that parish.

Thomas, Administrator, v. Bourgeat, Executor.

this court, was left open, only for the purpose of modification in relation to the Brandon debt. The Court of Pointe Coupée was authorized to allow a credit on the judgment, on motion, upon being satisfied that judgment had been rendered in favor of the estate of Brandon, in the Court of West Feliciana. To that extent only was the judgment still open, and subject to be amended. It is true the right was reserved to the defendant of claiming of the estate of Williams the sum of \$1107 61, alleged to have been paid by Mix to the Canal Bank; but it was not the intention of the court, that the final determination of the cause should await a further inquiry, as to that part of the defendant's account. As the judgment was originally rendered, that item was rejected, as unsupported by legal evidence. At the request of the defendant's counsel, we so modified it, as not to conclude his client. It then became a judgment of nonsuit as to that item. The right to proceed by rule, or on motion, implies the pendency of a suit between the parties, and is confined to incidental matters, which may arise in the progress of the contestation, except in certain cases where a summary proceeding is expressly allowed by law.

It is true we held in this case, that although Mix in his lifetime, deriving his authority to administer the estate of Williams from the Court of Probates for West Feliciana, was amenable to that Court, which alone could order the payment of debts due by the estate; yet, having died without rendering an account, that account could only be rendered in the Court of Pointe Coupée, where his estate was in progress of administration. But it by no means follows, that a claim of Mix against Williams, while the former was not administrator, as appears to have been the case in relation to the alleged payment to the Canal Bank, could be prosecuted in any other court than that of West Feliciana, where the estate of Williams is being administered.

Judgment affirmed.

 Haydel v. Betts.

GEORGE HAYDEL v. JOHN W. BETTS.

A verbal sale of a slave is good against the vendor, only when acknowledged by him, under oath, in answer to interrogatories, and where there was actual delivery of the slave. C. C. 2255. Where the answer denies the sale, it cannot be contradicted by the evidence of witnesses. Ib. 2415. Were it permitted, the prohibition of the law as to testimonial proof of verbal sales of real estate, or slaves, would be evaded, by alleging fraud, and propounding interrogatories, and, when answered in the negative, by offering testimony under the pretence of contradicting the answers.

The purchaser of a slave, sold under a *fi. fa.* against a party in possession, not shown to have been aware of the defects in the title of the latter, being a possessor in good faith, will be responsible to the owner for the value of his services, only from judicial demand. C. C. 495, 3416.

APPEAL from the District Court of Assumption, *Nicholls, J.*

Mathiot and Bodin, for the appellant.

J. C. Beatty, for the defendant.

MORPHY, J. The plaintiff has appealed from a judgment rejecting his claim to a slave named George, purchased by the defendant at a Sheriff's sale, in the suit of A. M. Foley against Raimond Laussade, in whose possession the negro was seized. The defendant, in his answer, had averred, that the plaintiff was without any title whatever to the slave, having transferred all his right, interest, and title therein, to the said Raimond Laussade; that the sale, however, was by private act, and had never been recorded, but was in the hands of Laussade, who, with the plaintiff, was fraudulently seeking to conceal the sale. To make good these averments, he propounded to his adversary certain interrogatories, in answer to which, the latter stated, under oath, that he had never passed any act of sale of the slave George to Raimond Laussade; that he had promised to sell him that negro, in case he would pay him nine hundred dollars; and that if he did not comply with this condition, he should return the negro. He further stated, that this agreement, which had taken place two years before, had become void by Laussade's failure to comply with the condition under which it was made, and that it had since been agreed between them, that, if the slave was left in the possession of Laussade, he should cure him of a disease with which he was afflicted. Parol evidence was then offered, to prove that the pe-

Haydel v. Betts.

itioner had declared to several persons, that he had sold the slave in question to R. Laussade; and our attention has been called to a bill of exceptions taken to the admission of such evidence. We think that the Judge erred. Verbal sales of slaves are declared by law to be void, unless acknowledged by the vendor when interrogated under oath, and accompanied by delivery. Civil Code, art. 2255. In the present case, the plaintiff, far from admitting, expressly denies that he made such a contract. Were the defendant permitted to disprove his answers by witnesses, he could establish the sale by testimonial proof, and thus do indirectly that, which under our Code, could not be done directly. Art. 2415. The prohibition of the law would be evaded in every case by alleging fraud and putting interrogatories, and when answered in the negative, by offering testimony under the pretence of disproving the answers. 3 La. 118. The testimony of the witnesses being disregarded, there is no evidence that the plaintiff ever divested himself of his title to the slave George; his agreement to sell him to Laussade was a conditional one, which was to take effect only in case he paid the plaintiff nine hundred dollars. As to the damages claimed for the illegal detention of the slave, the witnesses vary in their estimate of the value of his services; some valuing them at ten dollars per month, and others at six dollars. From the description given of this negro, and the admission of his master that he was laboring under some disease, we feel inclined to adopt the latter estimate, and will allow only six dollars per month, to be computed from the day of the institution of this suit, as the defendant must, we think, be considered a possessor in good faith up to that time. Civil Code, arts. 495, 3416.*

It is, therefore, ordered, that the judgment of the District Court be reversed: and that the plaintiff recover of the defendant the slave George, with damages, at the rate of six dollars per month, from the 2d of May, 1843, until the said slave be delivered; and it is further ordered, that the defendant pay the costs in both courts.

* There was no evidence to show that the defendant was aware of the defects in the title of the purchaser at the Sheriff's sale.

CHARLES SIMPSON v. PHÆBE PEIRCE.

APPEAL by the defendant from a judgment of the District Court of Terrebonne, *Nicholls, J.* This was an action on a promissory note. The judgment was for the amount claimed, providing however, that from that amount there should "be deducted the sum of thirty dollars, at the date of the judgment; which last sum the plaintiff is entitled to recover, upon showing that he is not responsible for the sum attached in the hands of the defendant."

J. C. Beatty, for the plaintiff.

Edgar, for the appellant.

MARTIN, J. The defendant, appellant from a judgment on her promissory note, complains that the court erred in making her liable for a sum of \$30, attached in her hands by a creditor of the plaintiff. She stated in her answer, that "she was held bound, as garnishee, by William Ross, plaintiff in attachment, in a suit against the present plaintiff and appellee, in the sum of \$30, which she opposes by way of reconvention." Her counsel has contended, that "the plaintiff and appellee, having his remedy against the attaching creditor, had no right to attack her, (the garnishee,) and put her to the expense and trouble of a defence, when the law does not allow her to interfere with the merits of the case between the plaintiff and defendant in the attachment; that the District Court had no jurisdiction over the attachment case, and had no right to inquire into the merits, nor to interfere, the amount being only \$30; that upon proof of the garnishee's liability to the attaching creditor for that sum, the court should have allowed it in compensation and reconvention, and, liberating the defendant, have left the plaintiff to pursue his remedy against the plaintiff in attachment, before the proper tribunal, by appeal or action of nullity.

It appears to us, that complete justice has been done to the defendant and appellant. She does not allege that she has paid any thing for the plaintiff and appellee, but that she may be liable to pay the sum of \$30 for him, in case he should be cast in the suit brought against him by attachment, in which she has been made garnishee. The District Court could not, after it deducted

the \$30 from the amount of her note, remain silent with regard to the consequence of a judgment in favor of the defendant in the attachment suit, for in that case, she might have retained the \$30 attached in her hands, to the injury of the present plaintiff and appellee. Perhaps the most correct way would have been, to reserve to the latter his right against the defendant and appellant, in case the attaching creditor should fail in the suit. But the District Court has done the same thing in different words, and the difference is not important enough to authorize us to reverse the judgment appealed from. The defendant and appellant denies, with ill grace, the jurisdiction of the District Court, while she claims the benefit of the action of that court against her as garnishee,* a benefit which the judgment appealed from has allowed her.

Judgment affirmed.

THE STATE v. ALEXIS PLAZENCIA.

On an appeal by the defendant, from a judgment in favor of the State, for the amount of a recognizance entered into by him for his appearance at court, the District Attorney who obtained the judgment is the proper person on whom the citation of appeal should be served.

The fact that a party is a fugitive from justice, cannot affect his right of appeal.

One who has bound himself in a recognizance to appear at a particular term of the court, will not be absolved by the omission of the Attorney for the State to proceed against him at that term. His appearance at that term, was the only means of protecting him from a forfeiture of his recognizance. *Per Curiam.* The law makes it the duty of the prosecuting attorney to have the parties bound by any recognizance called, and to take judgment against them, if the principal be not produced; but this direction to the attorney, does not release the parties to the recognizance.

APPEAL from the District Court of Assumption *Nicholls, J.*
J. C. Beatty, District Attorney, for the State.
Ilseley and Connely, for the appellant.

* The defendant was made a garnishee in a proceeding before a Justice of the Peace.

MARTIN, J. The defendant is appellant from a judgment against him, on a recognizance for his appearance at court. The Attorney for the State in the Second District, has prayed for the dismissal of the appeal, on the ground that the citation was not served on the proper officer, and on an averment that the defendant is not a resident of the parish of Assumption, as he states himself to be, but is a fugitive from justice, who conceals himself, and cannot be apprehended, or brought to court to stand his trial on the indictment found against him.

It appears to us, that the Attorney for the State, who has obtained the judgment appealed from, and is the representative of the State in that district, is the officer on whom the citation should have been served. If served on the Governor, or the Attorney General, neither of these functionaries could do any thing on the appeal, until he had communication with the District Attorney. Wherever the residence of this man may be, he has a right of appeal to this court; and his being a fugitive from justice neither destroys nor impairs his right. His appeal must, therefore, be sustained.

The counsel for the appellant urges, that the principal and his surety should have been called at the court at which the first was bound to appear by his recognizance; and that no proceedings having then been had, none could be correctly had at the succeeding term, when the judgment appealed from was taken.

The condition of the recognizance was, that the principal should appear at the May term after the recognizance was entered into. His appearance at that term was the only means of protecting him from the forfeiture of his recognizance. It is not pretended that he appeared. The law has made it the duty of the officer of the State to have the parties, bound by any recognizance, called, and to take judgment against them, if the principal be not produced; but this direction to the officer of the State does not absolve the parties to the recognizance. If they wish to resist the claim of the forfeiture to the State, they must allege and prove the appearance of the principal.

Judgment affirmed.

The Citizens Bank of Louisiana v. Tucker, Executor.

JOHN RUCKER WHITE v. CELESTIN GUYOT.

APPEAL from the District Court of Lafourche Interior, *Deblieux, J.*

J. C. Beatty, for the appellant.

Thibodeaux and Cole, for the defendant.

BULLARD, J. When this case was last before us, (4 Rob. 108,) we thought justice required it should be remanded for a new trial. The last trial terminated, as the first did, in a judgment against the vendor of the slave Fanny; and he has again appealed.

It appears to be satisfactorily proved, that the girl was diseased at the time of the sale; but whether her malady was such, as to render it probable that Guyot would not have purchased her, had he known its existence, formed the principal question in the case. She was far from being sound at the time of the last trial, and appears to have exhibited symptoms of an asthmatic affection. The case turns upon mere questions of fact. They have been solved by a tribunal better qualified than we are, to appreciate the testimony of the medical gentlemen who were called on to treat, or to examine her; and we are not enabled by any thing in the record to say, that the court was so clearly in error as to authorize our interference.

Judgment affirmed.

THE CITIZENS BANK OF LOUISIANA v. JOSEPH W. TUCKER
Testamentary Executor of Abner Robinson, deceased.

The stipulations in a contract of sale, by authentic act, cannot, between the parties or their representatives, be destroyed or weakened by parol evidence. Nothing but a counter-letter can have that effect.

Where, for the convenience of the vendors, in order to enable them to divide the price among themselves, the notes originally given by the vendees, are cancelled, and others executed in their place, each for smaller sums, but in the aggregate for the same amount, in the same form, and payable at the same periods, nothing being changed as to the position or obligations of the purchasers, there is no novation.

The ratification of an act cures all its defects; and a voluntary execution thereof, amounts to a ratification. C. C. 2252.

The Citizens Bank of Louisiana v. Tucker, Executor.

APPEAL from the Court of Probates of Lafourche Interior, McAllister, J.

L. Janin, for the plaintiffs.

J. C. Beatty, for the appellant.

SIMON, J. This is one of four suits instituted by different plaintiffs, against the testamentary executor of Abner Robinson, deceased. They arose out of one and the same transaction, and present the same cause of action, originating from the same circumstances.

The succession of Robinson is sought to be made liable for the payment of certain notes of hand, which were executed under the following circumstances: The Citizens Bank of Louisiana had a mortgage upon a plantation and slaves, owned jointly by Robert Bell and Thomas Barrett, in the parish of Iberville, to secure the sum of \$50,000, due to the Bank by the owners of the property. It appears that Bell and Barrett had concluded to sell the property mortgaged, to G. A. Botts and A. Robinson, and that some difficulty was found in making them a title thereto, as several judicial mortgages had been inscribed against the vendors. For the purpose of securing a title, it was arranged that the property should be sold by the Citizens Bank under its mortgage; that Botts and Robinson should bid for it \$75,000; that the Bank should afterwards allow time for the payment of the amount of its claim; and that notes should be furnished for the sum of \$75,000, bearing eight per cent interest from date, of which \$50,000 should go to the Bank, and the balance to Bell and Barrett, after deducting the expenses incurred by the Bank. Accordingly, Robinson, who could not personally attend, gave to G. A. Botts a notarial power of attorney, dated the 16th of August, 1839, to represent him in the purchase to be made in their joint names, and on their joint account, authorizing his said attorney, "to subscribe and accept all such deed, or deeds, of sale as may be expedient and necessary; also to make and subscribe in his name, and jointly with him, the said attorney, all such joint obligations, promissory notes, or bonds, and deed or deeds of mortgage, as may be required by the Citizens Bank; to subscribe also, if necessary, in payment of said purchase, notes to the order of the said constituent, and to endorse the said notes in the name of the said constituent, and to

bind him, the said constituent, thereby, *in solido*, with him, the said attorney, as firmly to all intents and purposes as he, the said constituent, might do, if personally present." The Citizens Bank became subsequently the nominal purchaser of the property, and an act of sale from the Bank to Botts and Robinson was executed on the 31st of January, 1840, in which Botts appeared for himself, and as Robinson's attorney in fact; in consideration of which, Botts signed the notes sued on in his double capacity, in the form of joint and several notes of the two purchasers, payable to the order of G. A. Botts, by whom they were endorsed; and the Bank having taken out of these notes the amount of \$50,000, secured by a first mortgage, the balance, secured by a second mortgage, was kept by the Bank to be delivered to Bell and to Barrett's assignee.

Some time afterwards, it was thought necessary to divide each of the notes which were to be given to Bell and Barrett, so as to enable them to hold each his own share respectively. A new act was passed accordingly, and the notes reserved for Bell and Barrett having been cancelled, others were given in their place, of the same form and tenor. This was done by an act passed on the 7th of April, 1840, in which Botts appeared and acted for his co-purchaser, Robinson.

Payments having been made on the price of this property, to an inconsiderable amount, all the remaining notes, held by the plaintiffs in the four suits, which were consolidated in the court below, form the subject of this controversy.

The grounds of defence set up by Robinson's executor, sued as one of the joint and several debtors, consist in the allegations: 1st. That the deceased had no interest in the transactions on which this suit is brought, having become a purchaser with Botts only for the accommodation of the latter, who was in reality the sole purchaser, to the knowledge of the plaintiffs; and that the Bank made a novation of the debt by a subsequent act, and granted time to Botts, &c. 2d. That Botts had no authority to bind the deceased in the manner in which he did, and that the notes sued on were not given in conformity with Robinson's power of attorney; and 3d. That the acts of Botts never were in any manner ratified by the deceased, but that he only transferred to the former,

in accordance with the original understanding between them, his apparent title to the one-half of the property, &c.

Judgment was rendered below in favor of the plaintiff for the amount sued for, and the defendant has appealed.

In addition to the facts and circumstances above set forth, the record discloses the following facts : Botts having sold to Bell, by a notarial act, passed on the 12th of February, 1840, fifty-five slaves acquired from the Citizens Bank. Robinson, by another authentic act, executed on the 15th of September following, confirmed and ratified the said sale, recognizing therein, that said slaves *had been acquired by Botts and Robinson jointly*, by the sale from the Citizens Bank, and that he, said Robinson, *was, at the time of the sale to Bell, the owner of one undivided half of said slaves*. By another notarial act, passed on the 18th of September, 1840, Robinson sold to Botts his half of the entire purchase made from the Bank on the 31st of January preceding, with reference to the two acts of the 31st of January and 7th of April, setting forth therein the mortgages thereby granted and *the notes therewith identified*, and stipulating, that said Botts "assumes and promises to pay the one-half of six certain promissory notes, *drawn by him and Abner Robinson jointly and in solido*, and also assumes and promises to pay the one-half of thirteen promissory notes, *drawn by him and Abner Robinson jointly and in solido*, to the order of, and endorsed by said Botts, &c.;" and acknowledging, that the property therein conveyed, was the same which had been purchased by them jointly from the Citizens Bank, for the sum of \$75,000, in consequence of his power of attorney, through the agency of Botts, &c.

With this evidence before us, the questions in controversy should perhaps be reduced to a single point, that of ratification; but we think proper to examine the grounds of defence, in the order they are set up in the answer.

I. The object of the power of attorney given by Robinson to Botts, was clearly the purchase of the property for which the notes sued on were given. This is explicitly stated in the act. No restriction is put, as to this object, on the powers given to Botts. He is authorized to purchase the property from the Citizens Bank, or from Bell and Barrett, in the name of, and jointly

with his constituent ; and nothing shows that the sale was a mere sham transaction on the part of Robinson. It is true that Botts' evidence, taken in this case, goes to show, that Robinson only lent his name to enable Botts to make the purchase on his own account ; and he states that the Bank was aware of this circumstance. But without pronouncing any opinion on the legality and admissibility of Botts' testimony, to which an exception was taken, we think it cannot have the effect of destroying or weakening the obligations contracted by Robinson towards the plaintiffs. It is the testimony of only one witness, intended to prove a different contract or obligation ; and we are not prepared to say, that it should be entitled to any weight against the stipulations contained in a written contract. Nothing can destroy those stipulations but a counter-letter, which it was the duty of the parties to have procured at the time of the sale. 3 Rob. 452. As to the alleged novation by the act of the 7th of April, we think it was sufficiently authorized under the power of attorney. This second act was a continuation of the transaction. The new notes were given for the same consideration, payable at the same time ; and nothing was changed in the position and obligations of the purchasers, but by a subdivision of their notes for the convenience of the vendors. This did not create a novation.

II. From the foregoing recitals of the powers given by Robinson to Botts, with regard to the execution of the notes, it is perhaps doubtful as to the form in which the obligation was to be contracted in the name of the constituent. He speaks of joint obligations, of promissory notes, and of bonds. He authorizes his attorney to subscribe notes to the order of his constituent, and to endorse them in the name of the latter ; but certain it is, in our opinion, that the implied, and even expressed intention of Robinson was, that his attorney in fact should have the power of binding his constituent, *in solido*, with himself, firmly, and to all intents and purposes. It seems to us manifest, that the procuration authorizes the attorney to create a joint and several responsibility, to secure the payment of the price or consideration of the joint purchase, and that, whatever be the form of the obligation, the deceased became bound as he originally intended to be, to wit, *in solido*, with his co-purchaser and attorney in fact.

Hullin, Syndic, v. Tucker, Executor.

III. But should any doubt exist as to the extent of Robinson's obligation, the acts by him passed on the 15th and 18th of September, 1840, in the latter of which he refers to the notes given and subscribed in his name by his attorney, must be considered as a sufficient confirmation and ratification of the acts of the latter performed in the execution of the procuration. The acts of the 15th and 18th of September, not only recognize the purchase in positive terms, but also refer to the promissory notes, as having been drawn by Botts and Robinson jointly and *in solido*. They are recited in the acts as having been executed by virtue of the power of attorney, in consideration of the joint purchase. Having thus been confirmed, ratified, and approved by the deceased, who knew of their existence, and who is not shown to have ever complained of the acts of his co-obligor, it does not lie in the mouth of his representative to say that his testator is not bound to comply with his obligations. The ratification of an act cures all its defects; and a voluntary execution thereof amounts to a ratification. Civil Code, arts. 2252. 2 Rob. 2.

Judgment affirmed.

JAMES B. HULLIN, Syndic of the Creditors of THOMAS BARRETT, an Insolvent, v. JOSEPH W. TUCKER, Testamentary Executor of Abner Robinson, deceased.

APPEAL from the Court of Probates of Lafourche Interior, Mc Allister, J.

L. Janin, for the plaintiff.

J. C. Beatty, for the appellant.

SIMON, J. This case presents the same questions as those submitted to our consideration in the case of the Citizens Bank against the same defendant. The claim set up by the plaintiff arose out of the same transaction, and must be governed by the rules recognized in the case just decided.

Judgment affirmed.

**THE EXECUTRIX and Universal Legatee of Robert Bell, deceased,
v. JOSEPH W. TUCKER, Testamentary Executor of Abner Ro-
binson, deceased.**

**APPEAL from the Court of Probates of Lafourche Interior, Mc
Allister, J.**

M. Taylor, for the plaintiff.

J. C. Beatty, for the appellant.

SIMON, J. This is another of the four suits instituted against the same defendant, for a cause of action growing out of one and the same transaction. The circumstances under which the plaintiff's claim originated, are identically the same as those on which our opinion was based in the case of the Citizens Bank against the same defendant, and the result must be the same.

Judgment affirmed.

**THE COMMERCIAL BANK OF NEW ORLEANS v. JOSEPH W.
TUCKER, Testamentary Executor of Abner Robinson, de-
ceased.**

**APPEAL from the Court of Probates of Lafourche Interior, Mc
Allister, J.**

L. Janin, for the plaintiffs.

J. C. Beatty, for the appellant.

SIMON, J. For the reasons adduced in the opinion just delivered in the case of the Citizens Bank, against the same defendant, in which the same facts and circumstances were established, we have come to the conclusion that the plaintiff in this case is entitled to recover.

Judgment affirmed.

SYLVESTER A. GORHAM v. FELIX H. HAYDEN.

Where no price has been fixed upon, there can be neither a sale, nor a promise to sell. C. C. 1757, 2414, 2437, 2439.

The nullity of the principal obligation involves that of the penal clause. C. C. 2119. Where a party to a contract enters into a new agreement, by which the execution of the first is rendered impossible, the other party will be absolved from any penalty, for failing to comply with its provisions.

To entitle a purchaser to rescind a contract of sale, or to recover damages against his vendor, for failing to comply with its terms, the latter must be put in default, in the manner directed by law. C. C. 1906, 1907, 1908, 1925, 1927. A party is put in default by the terms of his contract, only when it specially provides that he should be deemed to be in default, by the mere act of his failure. C. C. 1905.

An appellee will not be allowed damages for the appeal, as a frivolous one, where he has availed himself of it to ask for an amendment of the judgment of the lower court.

An order of seizure and sale, having been issued against two joint purchasers of a tract of land, for the amounts then respectively due by them, one of the vendees alone applied for an injunction, praying for a rescission of the sale, &c. An injunction was issued, arresting the proceedings as to both vendees. The injunction being subsequently dissolved: *Held*, that damages under the act of 25th March, 1831, § 3, could be allowed only on the amount due by the vendee, who had enjoined the proceedings; and that the act of 1831, being one of great severity, should be strictly construed.

APPEAL from the District Court of Iberville, *Deblieux, J.*

Edwards, for the appellant.

Labauve, for the defendant.

MORPHY, J. The petition represents, that on the 21st of August, 1841, the defendant, Felix H. Hayden, agreed to sell to the plaintiff a tract of land, in the parish of Iberville, for a valuable consideration, and bound himself, at the same time, in a penal bond, in the sum of one thousand dollars, to make to the plaintiff a good and valid title to the tract, on or before the first of January, 1842, and more particularly to obtain the renunciation and relinquishment of all her rights from his wife, Domitilde Hayden: and in the event that the title to the land was not made, and the renunciation not obtained by the first of January, 1842, Hayden was to forfeit and pay to the plaintiff the sum of one thousand dollars. It is alleged that this bond, or obligation, was deposited with F. Dugué, Parish Judge of the parish of Jefferson, who lost,

Gorham v. Hayden.

or mislaid it; that on the 23d of December, 1841, Hayden passed a public act of sale of the said land to the plaintiff and James J. Neilson, selling to each one undivided half, for the sum of five thousand dollars; that for the payment of one-half of the purchase money, plaintiff furnished his five promissory notes, the first for \$550, payable in March, 1842; the second for a like sum, payable in March, 1843; the third for a like sum, payable in March, 1844; the fourth for a like sum, payable in March, 1845; and the fifth for the sum of \$300, payable in March, 1846; that the act of sale, though signed by the plaintiff and Hayden, was not completed and closed by the signatures of the witnesses and the Parish Judge of Jefferson, as it purports upon its face, on the 23d day of December, 1841; but that it was left open, unfinished, and incomplete, for the purpose of obtaining the signature and renunciation of Domitilde Hayden, which Hayden had promised and obligated himself to procure on the next day, to wit, the 24th of December, 1841, but which he failed and neglected to do until about the first of April, 1842, after the plaintiff's first note had become due; thus leaving the act incomplete, and the plaintiff without any title until that time, when the act was signed by the wife, and closed in due form. The petition avers, that the neglect of Hayden to complete plaintiff's title to the land, has caused a forfeiture of his penal bond or obligation, and rendered him liable to pay to the plaintiff its amount, to wit, one thousand dollars; that the plaintiff had purchased the land, in the hope of selling the same at a profit; that about the first of February, 1842, the plaintiff, and the said Neilson, were offered the sum of \$6000 for the land, by one John N. Thomas, a responsible man, which offer was accepted by them; that they could not sell the land, having no legal title to the same, in consequence of Hayden's neglect to comply with his agreement, whereby the plaintiff suffered damage to the amount of \$500; and that Hayden, having failed to complete the act of sale by the first of January, 1842, has annulled and cancelled the contract, so far as the plaintiff is concerned or interested therein. The petition further represents, that Hayden has sued out an order of seizure and sale against the land, and it concludes by praying, that an injunction may be issued, restraining all further proceedings; that the sale of the

land may be cancelled, so far as the plaintiff is concerned ; that his notes, given in payment for the land, may be cancelled and returned ; and that Hayden may be decreed to pay to him the sum of \$1500, with costs, &c.

A motion to dissolve the injunction upon the face of the petition, was sustained below, and the injunction was dissolved with damages. The plaintiff has appealed.

We are of opinion that the Judge, *a quo*, did not err. Considering as true all the facts set forth in the petition, as we are bound to do on the trial of a motion to dissolve upon the face of the papers, we cannot find in them any ground upon which to rest the petitioner's claim for damages, or for a rescission.

It may well be doubted whether the obligation of the 21st of August, 1841, to sell the land to plaintiff for a *valuable consideration*, constituted either a sale, or a promise to sell, as no price had been fixed upon, and the contract was wanting in one of its essential requisites ; and it is well settled that the nullity of the principal obligation involves that of the penal clause. Civil Code, arts. 1757, 2119, 2414, 2437, 2439. 1 Pothier, Oblig. No. 339.

But admitting that the obligation was of sufficient validity to bind the defendant on his bond, the plaintiff himself shows that on the 23d of December, 1841, a new and different contract was made, to which he himself became a party, which was a sale to himself, and to James J. Neilson, each for one undivided half of the same tract of land. By this new agreement, the execution of the first was rendered impossible, as Gorham could no longer buy, nor Hayden sell the whole land. Gorham, we think, may well be considered as having, by his own act, waived or discharged the penal bond. It is clear, that he made the second contract without any reference to that instrument ; for he tells us, that after the parties had signed the act, and he had furnished his notes, it was stipulated that the renunciation of the vendor's wife should be given on the next day, to wit, on the 24th of December, 1841, a different day from that stipulated in the first contract. No penal stipulation appears to have been alluded to, or thought of, by the parties at that time. There seems to have been remissness and neglect in completing the act on the part of the vendor ;

but although the petitioner alleges that he had been aggrieved by the loss of the offer of \$6000 for the property, in February, 1912, he does not appear to have taken any steps to quicken the vendor in the performance of his obligation, or to recede from the contract, as he might perhaps have done. He quietly suffered the act to be made complete and binding on him, in the following April. From his whole conduct, it is but fair to suppose, that he did not think of refusing payment of his notes, or of claiming damages, or of the rescission of the sale. But, be this as it may, and admitting that the penal bond was not waived and annulled by the new contract between the parties, it was necessary, after the time appointed for the compliance with the terms of the bond, and before they were actually complied with, that Hayden should have been legally put in default, to authorize a claim for rescission, or in damages. It is nowhere alleged in the petition, that the appellee was put in *mora*, before the 1st of April, 1912, in either of the ways pointed out by law. Civil Code, 1906, 1907, 1908, 1925, 1927. 6 Mart. N. S. 226. 1 La. 214. 2 Robinson, 498. A party is put in default by the terms of his contract, only when it specially provides that he shall be deemed to be in default, by the mere act of his failure. Civil Code, art. 1905. We, therefore, conclude that the plaintiff is without any right, either to damages, or to a rescission of his contract.

We have been called upon by the appellee, to amend the judgment of the District Court, by increasing the damages assessed, and, at the same time, to treat this appeal as a frivolous one, and to give him damages for the delay consequent thereon. We can do neither. He cannot have damages for the appeal, because he has availed himself of it, to ask for an amendment of the judgment he obtained below. Although a general injunction had issued in the case, it does not appear to us that the inferior Judge improperly limited the damages he allowed under the law of 1881, to the amount due by Gorham, who alone had enjoined the order of seizure and sale. We have often held, that this law, being one of great severity, should be strictly construed. In relation to the special damages, the Judge under whose eye the proceedings took place, was more competent than we can be to assess them.

Gardiner v. Cross.

We cannot say that he erred in fixing the amount which he thought proper to allow.

Judgment affirmed.

JOHN GARDINER v. BENJAMIN CROSS.

An exception to a petition on the ground that the name under which plaintiff sued is not his real name, will be overruled, where it does not state the name under which alone he could have sued.

In answer to an action for an assault and battery, defendant alleged that plaintiff had been assaulted in consequence of having attempted to excite defendant's slaves to insurrection. Defendant offered to prove that, immediately before the assault, he (defendant) had "said, that he had been told by a person, who had heard it from a slave, that plaintiff was endeavoring to induce defendant's negroes to run away."

On objection: *Held*, that the evidence was inadmissible.

In an action for damages, for an assault and battery and slander, evidence as to the plaintiff's character is inadmissible, even in mitigation of damages.

APPEAL from the District Court of Lafourche Interior, *Deblieux, J.*

Thibodeaux for the plaintiff.

J. C. Beatty, and M. Taylor, for the appellant.

MARTIN, J. This is an action for assault and battery, and slander. The defendant attempted to justify or extenuate his conduct, by averring that the plaintiff had long persisted in remaining on his land, although frequently desired to depart; that he frequently went into the cabins of his slaves, associating with them, and exciting them to insubordination, disobedience and disorder; that after bearing with this for a long time with patience, he was at last driven to violent measures to separate the plaintiff from his slaves, provoked by the abuse and intemperate language with which his remonstrances to the plaintiff had been received.

The case was tried by jury, who gave a verdict for \$800 in favor of the plaintiff, and the defendant appealed, after an unsuccessful attempt to obtain a new trial. The case is a very aggravated one. The plaintiff was compelled to submit to being tied and whipped. He was extremely ill treated and abused, and it does not ap-

Gardiner v. Cross.

pear to us, that the jury erred in concluding, that the defendant entirely failed in his attempt to justify, or extenuate his conduct. His counsel has drawn our attention to an exception which they took to the petition, on the ground that the name of John Gardiner, under which the plaintiff sued, was not his real name. The court overruled it, and we think correctly, as the exception did not state the name under which alone the plaintiff might have sued, and he might be known by different names. Two bills of exceptions were taken on the trial. The first, to the refusal of the court to permit the defendant to prove, that he had been told that a slave had been heard to say, that the plaintiff was endeavoring to induce some of the defendant's slaves to run off.* The second, to the court's refusal to admit evidence of the plaintiff's character. It does not appear to us that the court erred. Evidence of what a person said that he had heard that a slave had said, is most certainly inadmissible. Whatever may be the character of a white man, it cannot follow, that any one has the right of inflicting on him such a chastisement as the plaintiff received in the present case. The evidence was inadmissible even in mitigation of damages. It is certainly true, that the attempt to excite slaves to insubordination, ought to be promptly and effectually suppressed; but this may be done, without planters being permitted, with impunity, to chastise, in the manner in which they punish their slaves, persons against whom suspicion may exist. Twelve honest men of the vicinage, constitute a competent body, to whom courts of justice may safely leave the power of deciding on the character of the aggression; and there can be no great danger from their partiality to evil doers, or their inclination to do injury to their neighbors, especially when their verdict must meet the approbation of the learned Judge who presides over their deliberations.

Judgment affirmed.

* It appears from the bill of exceptions that, "the counsel of the defendant offered to prove by the witness, that immediately before the assault committed by defendant, the defendant said, that he had been told by a person, who had heard it from a slave, that the plaintiff was endeavoring to cause or induce his, defendant's, negroes to run off, &c."

JOHN D. ARBONNEAUX V. JEAN BAPTISTE LETOREY.

A physician's bill is prescribed by three years. C. C. 3503.

Prescription may be pleaded in every stage of the case before final judgment, and even on appeal; but it must be pleaded expressly and specially. C. C. 3427. The court cannot supply such a plea, where the party, in whose favor it exists, has not thought proper to take advantage of it. C. C. 3426.

Plaintiff having sued for the amount of a bill, for services, as a physician, rendered by him to defendant; the latter pleaded in compensation a note, for a larger amount, drawn by plaintiff to his order, held by him, and not prescribed at the date of the services rendered: *Held*, that plaintiff's claim was extinguished by compensation.

APPEAL from the District Court of Ascension, *Nicholls, J.*
Connely, for the plaintiff.

J. C. Beatty, for the appellant.

MORPHY, J. This suit, which is a claim for medical services rendered to the defendant, a planter of the parish of Ascension, was instituted on the 13th of May, 1841. The petition charges, that at the special instance and request of Jean Baptiste Letorey, the plaintiff, throughout the year 1837, attended on his plantation, and furnished medicines, &c., and that his services were reasonably worth two hundred and fifty dollars; that, during the year 1838, he attended the plantation, and that his attendance was reasonably worth \$81 50; that during the latter part of 1839, and the beginning of 1840, he attended the same plantation, and that Letorey specially agreed to pay for such attendance the sum of one hundred and forty dollars; and, that during this last year he furnished medicines to the amount of \$33; that at the special order of Letorey, the plaintiff attended on the plantation of Madame Conand, near Donaldsonville; and that the services there rendered, were worth \$52. The petition further claims \$41 for the special treatment, by the plaintiff, of two slaves belonging to the defendant, and charges that all the above services were well worth the prices affixed to them, amounting to \$597 50, for which it concludes by praying for a judgment against the defendant. The answer, after pleading the general issue, sets up in compensation, a sum of \$300 47, being the amount of a promissory note, drawn by the plaintiff to the order of the defendant, which became due in March, 1834, and a further sum of \$24, for corn furnished

to the plaintiff, in 1837. The case was tried by a jury, who gave the plaintiff a verdict for \$273. This verdict was, on motion, set aside, and a new trial granted; whereupon, the defendant, with leave of the court, filed the plea of prescription of three years against the plaintiff's claim. The case was then submitted to a second jury, who brought in a verdict for \$273 50 for the plaintiff. After an ineffectual attempt to obtain another new trial, the defendant appealed.

Whatever may be our respect for the verdicts of juries in general, we cannot sanction that given in the present instance. It seems to have been rendered without any regard to the evidence or pleadings in the case, and by merely deducting from the claim of the plaintiff, the amount pleaded in compensation by the defendant. Even were both claims fully made out, such a process would not be justified by the pleadings. The prescription of three years, set up by the defendant, at once excludes all that portion of the petitioner's claim which relates to services rendered previous to the 13th of May, 1838, leaving a balance which would be more than compensated by the defendant's claim, against which no prescription has been pleaded, either below, or in this court. Prescription may be pleaded in every stage of a cause, even on the appeal; but it must be pleaded, expressly and specially, before the final judgment; and the court cannot supply such a plea, when the party, in whose favor it exists, has not thought proper to take advantage of it. Civil Code, art. 3426, 3427. But, perhaps it may be said, that as replications are not allowed, under the practice of our courts of original jurisdiction, all the matters or claims set up in an answer, are open to every objection of law and fact, such as violence, fraud, prescription, and the like, in the same manner as if such exceptions had been specially pleaded. Admitting this to be true, and considering the plaintiff as having, in his turn, pleaded the prescription of five years, he would be in no way benefitted by such a plea. The only portion of his claim which is, in any way, supported by evidence of a satisfactory character, is that for the year 1837, which includes the charges made for the two slaves, the whole amounting to \$291. This sum, which falls within the prescription of three years, is, moreover, compensated by the amount of the plaintiff's note, which

Cressap and others v. Winchester, Executor.

became prescribed only on the 1st of March, 1839. The balance of the plaintiff's demand is entirely unsupported by proof. He has not established the existence of any agreement with the defendant, for the year 1839; nor has he shown the extent or value of his services to the defendant. As to those rendered on the plantation of Madame Conand, there is no evidence that they were ordered by the defendant, except as the known agent of that lady, whose debts he never assumed to pay.

It is, therefore, ordered that the judgment of the District Court be reversed, and that ours be for the defendant, with costs in both courts.

JOHN V. CRESSAP and others v. BENJAMIN WINCHESTER, Testamentary Executor of Joseph Thompson, deceased.

Objections to a verdict and judgment, on the ground that a juror and one of the witnesses were interested, cannot avail a party to the action, who did not appear at the trial, and challenge the juror or object to the witness; nor would such objections support an action of nullity; much less could a mere guardian of property attached in the suit, question, collaterally, the correctness of the decision, on such grounds.

Service of notice of judgment on a defendant at his last place of residence in the parish in which the judgment was obtained, is sufficient, although he may have afterwards resided in another parish in the State.

APPEAL from the Court of Probates of Iberville, *Dutton, J. Edwards* and *T. G. Morgan*, for the appellants.
Labauve, for the defendant.

BULLARD, J. This is an action upon a bond executed by the defendant's testator, under the following circumstances: Cressap, one of the plaintiffs, having instituted a suit by attachment against one Janes, and the Sheriff, having seized and taken into his possession certain slaves belonging to Janes, took the bond in question, in which it is recited, that the Sheriff having attached said slaves, setting forth their names, and the law having provided, in like circumstances, that the Sheriff may appoint a guardian or guardians therefor, he had conformed to said provision, and ap-

pointed Joseph Thompson and William Janes guardians of said slaves, for their better preservation, until their final adjudication, or until the further order of the court. The said guardians bind themselves not to deliver the said negroes, nor any of them, to any person except the one to whom they may be adjudicated. Joseph Janes, as principal, and Joseph Thompson and William Janes as sureties, bind themselves in the penal sum of \$8000, conditioned that, if Janes, Thompson and Janes, guardians as above, shall take and faithfully keep, and faithfully perform all the duties of a guardian, or a prudent father of a family, until their final adjudication, and have the said negroes to deliver them to the said Sheriff, &c., or to any other person to whom the same may be adjudicated by a final decree, then the obligation to be null and void, otherwise to remain in full force and virtue.

The plaintiff, Cressap, prosecuted his suit against Janes to final judgment, and having recovered \$5000, the property attached was ordered to be sold to satisfy the same. The judgment was rendered in 1837, and notice of judgment was served at the last place of residence of the defendant Janes, in the the parish of West Baton Rouge, in 1839. A writ of *feri facias* was issued, some time afterwards, on which the Sheriff returned that he had received \$500. An *alias feri facias* was then issued, on which the Sheriff returns, that after diligent search no property could be found, and that demand could not be made on the defendant, on account of his being out of the State. It is shown, that the Sheriff demanded of Thompson to give up the slaves, and another demand is afterwards shown upon his executor. The Sheriff having transferred the bond to the present plaintiffs, this suit was brought to recover of the estate of Thompson, the balance still due on the judgment against Janes, the executor having refused to admit the claim against the estate.

The court being of the opinion that Thompson had not been put *in mora*, gave judgment for the defendant, and the plaintiffs have appealed.

It is contended, by the counsel for the appellee, that the judgment obtained by Cressap against Janes, was obtained through fraud, collusion, and unfair means; that the trial was, *ex parte*,

neither Janes, nor his counsel, appearing ; that one of the sureties on the attachment bond was a juror, and another a witness.

The record shows, indeed, that when the case was called for trial, the defendant and his counsel did not appear ; and the plaintiff proceeded to the trial, which, under such circumstances, he had clearly a right to do. We are of opinion, that if the objections made, on the ground that one of the jurors and one of the witnesses were interested, could not avail even Janes on appeal, unless he had appeared at the trial, and made his challenge to the juror, and his objection to the witness. Nor would it be good ground for an action of nullity ; much less has the guardian of the property attached a right to question, collaterally, the correctness of the judgment.

It is next objected, that the judgment has not become executory, and that until then, no demand could be made for the slaves ; and that the pretended service of notice of judgment is insufficient, because the last place of residence of Janes in this State, was in the parish of Iberville, and not in West Baton Rouge. But we are of opinion, that the notice of judgment, at the last place of residence in the parish where the judgment was obtained, is sufficient, although the defendant may have afterwards had another place of residence in the State.

The demand made by the Sheriff of Thompson, was, in our opinion, sufficient to put him in delay. The Sheriff was primarily liable for the safe keeping of the property attached, and as soon as judgment was rendered, ordering the property to be sold, he had a right to require the guardians to surrender it.

It is further contended, that the obligation to deliver the slaves is not, *in solido*, although the penalty be so ; that before the penal bond can be forfeited, it must be shown that the obligors have failed to comply with the principal obligation ; and that there is no proof that the parties to the bond were put in default.

Joseph Thompson and William Janes were appointed guardians, and obliged themselves, and each of them, safely to keep the property confided to their charge, &c., under the penalty of eight thousand dollars, which each of them, *in solido*, with Joseph Janes, had, by a previous clause in the bond, bound himself to pay. The demand was made of Thompson, who was bound

Robinson v. Aubert.

primarily, as it relates to the principal obligation, to keep the property and restore it to the Sheriff; and that, in our opinion, suffices.

But it is said, that Thompson never was in possession of the slaves, and that Cressap never acquired any title to them. To this it is answered, that Thompson assumed to act as guardian of the property attached, and undertook that the slaves should be given up according to the judgment of the court; and that, although Cressap did not recover the slaves as his property, he recovered a judgment which ordered them to be sold to satisfy his demand.

Upon the whole, we conclude, that the Court of Probates erred in giving judgment for the defendant; and that the plaintiffs are entitled to recover the balance due upon the judgment against Janes.

It is, therefore, ordered, that the judgment of the Court of Probates be reversed, and that the plaintiffs be set down and recognized as creditors of the estate of Joseph Thompson, for the sum of four thousand five hundred dollars, with interest at five per cent from the 16th of November, 1842, to be paid in due course of administration; and that the defendant pay the costs of both courts.

ABNER ROBINSON V. CHARLES AUBERT.

Though but one instalment of a debt secured by a mortgage by authentic act, be due, an order of seizure and sale may be obtained for the whole amount of the debt, but the sale must be on terms of credit corresponding with the periods at which the remaining instalments fall due.

APPEAL from the District Court of Lafourche Interior, Nicholls, J.

J. C. Beatty, for the plaintiff.

M. Taylor, for the appellant.

MARTIN, J. The defendant and appellant assigns as an error apparent on the face of the record, that the order of seizure and

sale in this case was granted for a sum not due to the plaintiff, and for which no mortgage or privilege existed in his favor.

The counsel for the plaintiff and appellee urges, that the order of seizure, as originally issued, was well taken, and would not, even without a *remittitur*, justify an appeal; for though no order had been given by the court, the plaintiff might have required a sale on terms corresponding with those of the contract. The plaintiff obtained an order of seizure and sale on a mortgage given to him by an authentic act, for the sum of \$22,466 52, (the amount of four promissory notes of the defendant,) on terms corresponding with the maturity of said notes respectively, one of which was due and payable for the sum of \$5657 12.

The plaintiff afterwards entered a *remittitur*, or release of so much of the order of seizure, as required the premises to be sold on a credit till the 1st of April, 1845, to satisfy a sum of \$8809 40, with the interest thereon, the amount of the fourth promissory note, payable on that day.

The defendant appealed. The four notes were annexed to the authentic act of mortgage, and identified therewith by the signature of the Parish Judge of Lafourche Interior. It is true, that one of them only was payable at the time the order of seizure and sale was issued. Another has since become due. There is no evidence in the record, of any payment made by the defendant, so that the order of seizure and sale was correctly issued for the amount of the four notes, and we are unable to say on what ground the defendant could have been relieved by us, even had no *remittitur*, or release, taken place. Where the whole debt is not payable at the time the order of seizure and sale is issued, the sale, for the deferred payments, must be ordered to take place on a credit corresponding with the periods at which the payments become demandable. 16 La. 163.*

Judgment affirmed.

* Under the direction of the Judges, there is in the last sentence of this decision, as published, an alteration of the language of the original MSS., rendering the opinion conformable to the intentions of the court, and to the decision referred to in the 16th volume of the Louisiana Reports.

CHARLES AUBERT V. AENER ROBINSON.

If execution be issued after a suspensive appeal, the Judge of the inferior court may grant an injunction to prevent a sale. *Per Curiam*. This is not to interfere with the judgment appealed from, but to insure to the appellant the benefit of his appeal.

An appeal from an order of seizure and sale will be suspensive, if taken within ten days, Sundays not included, from the notice of judgment to the party cast. C. P. 575.

APPEAL from the District Court of Lafourche Interior, Nicholls, J.

M. Taylor, for the plaintiff. An appeal lies from an order of seizure and sale (12 Mart. —. 3 lb. N. S. 498. 3 La. 316;) and is suspensive, if taken within ten days. Code of Pract. art. 575.

J. C. Beatty, for the appellant. The court, *a qua*, has no power to decide whether an appeal be suspensive, or not. *City Bank v. Walden*, 19 La. 172. *Lartigue v. Peet*, Ib. 174, 178. An appeal from an order of seizure and sale is not suspensive, if taken after three days. Code of Pract. art. 735.

MARTIN, J. On an allegation that he had obtained a suspensive appeal from an order of seizure and sale, illegally issued against him at the petition of the defendant, notwithstanding which the latter had directed the Sheriff to proceed to the sale of the mortgaged premises although a sufficient bond had been in due time filed, the plaintiff obtained an injunction to stop the sale. See the case of *Robinson v. Aubert*, just decided. The defendant prayed for a dissolution of the injunction, on the grounds: *First*, That the court is without authority to stay proceedings in a case in which an appeal to the Supreme Court is pending. *Secondly*, That though the court have authority, the appeal taken by the present plaintiff is devolutive only, and not suspensive, no bond having been filed early enough to render the appeal suspensive. The injunction was made perpetual, and the defendant has appealed. His counsel contends, that the injunction was improperly granted; that if the proceedings under the order of seizure and sale after the appeal was obtained, were irregular, the remedy was by a

writ of prohibition issued from this court, the inferior tribunal being without authority to decide on the character of the appeal; that the appeal was not suspensive; and that under the Code of Practice, art. 575, the appeal has the effect of suspending the execution, if taken within ten days, Sundays not included, subsequent to the notice of judgment given to the party cast, clearly referring to art. 624, where a ten days' notice is required before proceeding to the execution of a judgment; while art. 735 declares that it is permitted to proceed to execution under an order of seizure and sale, after three days notice.

The counsel for the appellee argues, "that an appeal lies from an order of seizure and sale, and is suspensive, if taken ten days after, exclusive of Sundays."

We have often sustained appeals from orders of seizure and sale, but we have never been called upon to determine, whether there be any difference between such appeals, and those from judgments contradictorily rendered in court, with regard to the number of days within which the suspensive appeal must be taken.

It appears to us, that the court did not err. If execution be issued after a suspensive appeal has been taken, the Judge, *a quo*, may well grant an injunction to prevent a sale; for this is not to interfere with the judgment appealed from, but to insure to the appellant the benefit of his appeal.

The first notice which the debtor had of the order of seizure and sale was, that which the Sheriff gave him after he received the writ. This appears to have been on the 18th of July. The appeal was granted on the 23d, and a sufficient bond to suspend the execution was given on the 25th, *id est*, seven days after the first official knowledge communicated to the debtor, of the grant of the order of seizure and sale.

Judgment affirmed.

JEAN PIERRE MICHEL v. COLLINS BLACKMAN.

Plaintiff moved to dismiss his action, at his costs, and an order was made accordingly, but before the order of dismissal was signed, it was set aside on his own motion, without notice to defendant. A judgment by default was subsequently taken, and confirmed against the defendant. On appeal by the latter: *Held*, that after dismissing his action, plaintiff could not have the order of dismissal set aside, and the case re-instated without notice to defendant.

APPEAL from the District Court of Pointe Coupée, *Nicholls, J. Labauve*, for the plaintiff.

L. Janin, for the appellants.

GARLAND, J. This is a petitory action, in which the plaintiff sets up title to a tract of land, which he alleges the defendant has taken into possession, under the pretence of an adverse title, and on which he has committed trespasses and waste, by cutting timber, wood for the use of steamboats, &c. The petition concludes with a prayer, that the wood lying on the ground may be sequestered, and that the plaintiff may be quieted in his title.

The defendant answered by a general denial, and an allegation of title to the premises on which he had cut the wood. Interrogatories were propounded to him by an amended petition, to which he answered, that the cords of wood sequestered were not cut within the limits of the tract of land claimed by the plaintiff. Before a trial was had on these issues, Collins Blackman died, and an order was made reviving the suit against his heirs and legal representatives. Notice of this revival was not served on the tutor of the heirs, who are minors, until nearly eighteen months afterwards. In the meantime, the plaintiff made a motion to discontinue his suit, and it was dismissed at his cost; but before a regular judgment was signed, he prayed the court to set the order of dismissal aside, which was done, without notice to the defendant. Sometime after, the tutor of the minors was cited to appear; he made default, and a final judgment was rendered in favor of the plaintiff, from which the present tutor of the minors has appealed.

Shortly after the judgment by default was made final, the plaintiff withdrew from the Clerk's office the original title papers,

on which he relied to obtain a judgment, leaving his receipt for the same, so that no statement of facts could be made. The record comes up with a certificate of the Clerk, that it contains all the evidence upon which the cause was tried, except the documents withdrawn by the plaintiff.

The counsel for the appellant assigns as one of the errors apparent on the face of the record, that, on the 21st May, 1839, the suit was dismissed on the plaintiff's own motion and at his cost; and that he had no right to have such judgment of dismissal set aside, and the cause re-instated on the docket, without a notification to the defendant. We think this objection fatal to the plaintiff's action. It would lead to many difficulties, and often enable a plaintiff to entrap a defendant, were he permitted to dismiss his action, and, after the latter had left the court, re-instate it without notice, and obtain a judgment. 15 La. 59.

It is, therefore, ordered, that the judgment be annulled and reversed; that a judgment of nonsuit be entered against the plaintiff; and that he be condemned to pay the costs in both courts.

GABRIEL WINTER v. JAMES W. ZACHARIE.

Defendant having purchased a plantation and slaves at a Sheriff's sale, made under a *f. fa.*, issued on a judgment obtained by him against the plaintiff, procured a monition to show cause why the sale should not be homologated. Plaintiff opposed the homologation, and, on the same day, brought suit, in the parish where the land was situated, and not that of defendant's domicile, to recover the land and slaves, with their fruits and revenues, and for damages against the defendant for having illegally and forcibly taken possession. The sale having been avoided, on the opposition to the monition, defendant prayed for the dismissal of the action, on the grounds that the main question, of title, had been decided on the monition, and that the plaintiff had no right to cumulate with his petitory action, a personal one against the defendant, for the fruits and revenues, or for damages: *Held*, that notwithstanding his opposition to the monition, plaintiff had a right to commence the action; that, though the question of title was decided on the monition, that as to defendant's liability for the fruits and revenues, was undetermined, and that being a mere incident of the action of revendication, the suit was properly brought in the parish where the property is situated, although the defendant resides in another; and that juris-

Winter v. Zacharie.

diction having been once vested, it could not be divested by a judgment on a part of the matter in controversy. C. P. 153, 154, 162, 163.

A possessor of a plantation and slaves, responsible to the owner for the fruits and revenues, will be bound to account for such a crop as he might have made therefrom, with ordinary good management. The actual production of the plantation, which was proved to have been neglected, is not a just measure of the damages due to the owner.

APPEAL from the District Court of Ascension, *Deblieux, J. M. Taylor*, for the plaintiff.

Ilsley, Nicholls and Winchester, for the appellant.

MORPHY, J. The defendant, Zacharie, having become the purchaser of a sugar plantation, and seventy-one negroes, in the parish of Ascension, sold under an execution issued on a judgment he had obtained against the present plaintiff, took possession of the property on the 6th of March, 1840, and procured from the District Court a monition, calling on all persons to show cause why the Sheriff's sale to him should not be homologated. Winter filed an opposition based on various grounds, which was sustained by the District Court, whose judgment, annulling the Sheriff's sale, was affirmed by this court. See 17 La. 80. On the very day that Winter filed his opposition in the monition case, he brought the present action, to recover from Zacharie the land and slaves thus illegally sold, and to claim of him \$15,000 a year for the fruits and revenues gathered by him during his illegal detention, and for the further sum of \$10,000, as damages for illegally and forcibly taking possession of his property. No step appears to have been taken in this action until after the final decision of the monition suit, when the defendant appeared and filed an exception, praying for the dismissal of this action, on the grounds that the main question raised in it, to wit, that of title to the land and slaves, had already been settled and decided in the other suit, in which the Sheriff's sale to Zacharie, of the same land and slaves, had been avoided on the opposition of Winter; that, if this action be maintained so far as regards the question of the title to the land and slaves, the defendant is a resident of the city of New Orleans, where alone he is suable in all personal actions, and that the plaintiff had no right to cumulate with his petitory action, a personal one against the defendant,

whether founded on a claim for damages, or for remuneration for fruits and revenues, or for hire or otherwise, &c. This exception having been overruled, the defendant pleaded the general issue. The case was then tried before a jury, who gave the plaintiff a verdict of \$7000. After an ineffectual attempt to have it set aside, judgment was entered accordingly; whereupon the defendant appealed.

The inferior Judge correctly overruled the exception taken by the defendant. This action is a mixed one, as defined by article 7 of the Code of Practice, in which the claim for the fruits, or their value, is an incident to the main action to recover the property. Notwithstanding Winter's opposition in the monition suit, to prevent the Sheriff's sale from being homologated, he had a right to institute this action against the defendant, who was in the possession and enjoyment of his property. He could not be deprived of this right by that given to the defendant, of having all the defects in his title examined into and cured as to all the world, by the publication of the monition. The question of title being settled in that proceeding, left undecided that relative to the fruits and revenues, which being a mere incident of the action of revendication, was properly brought in the parish where the property is situated, although the defendant resides in a different parish. Jurisdiction being thus rightfully vested, it was not taken away by an adjudication on a part of the matter in controversy. Code of Practice, art. 153, 154, 162, 163.

The appellant complains, that the jury allowed against him excessive and vindictive damages. Were this manifestly the case, we would remand the cause for a new trial, as it is not one in which vindictive damages should, in our opinion, be awarded; but upon an examination of the evidence, we think with the Judge below, that although the sum allowed is rather large, the jury might well have considered it only as a just remuneration for damages actually suffered. The plaintiff proved, that the preceding year, 1839, the crop of his plantation amounted to one hundred bales of cotton, and from eighty to one hundred hogsheads of sugar. At ordinary prices, such a crop would produce a sum exceeding that allowed by the jury; and several planters have testified, that with good management, such a plantation, with the

Winter v. Zacharie.

slaves on it, ought to yield much more. The defendant has not rendered any complete account of the actual product of the plantation during the year he had it in his possession. The person he employed as an overseer, has declared, however, that he made only eight or nine hogsheads of sugar, and that the field of cotton, which was nearly destroyed by caterpillars, produced only twenty-five bales. This scanty crop appeared, no doubt, to the jury to have been the result of mis-management and neglect; as the evidence shows, that the plantation was at times abandoned, and the hands employed on another plantation of the defendant's, called the Laroque plantation; that during the grinding season, they remained at the latter place for six weeks; and that more than one-half of the cane belonging to the Winter plantation was taken away to plant on the Laroque plantation. It further appears, that due diligence was not used in grinding the cane left on the place, so that it was much injured by the frost. This conduct of the defendant, or his agents, rendered the value of the fruits and revenues which he actually gathered from the Winter plantation, trifling and of no account. Under such circumstances, the jury appear to have held the defendant responsible for the crop, which he might have made with ordinary good management. The amount they allowed, although perhaps large, may not and does not, we think, include vindictive damages. They were the legitimate judges of the injury sustained by the plaintiff, and we do not feel ourselves authorized to disturb their verdict.

Judgment affirmed.

SAME CASE—ON A RE-HEARING.

BULLARD J. A re-hearing was granted in this case, on the suggestion that the jury had rendered a verdict for vindictive damages; whereas the plaintiff was entitled simply to indemnity, according to the opinion of this court first pronounced. We have, therefore, given to the whole case an attentive consideration, and have examined the evidence upon which the jury acted, and proceed to give the result of our reflections on the subject:

In the first place, it has great weight, with us, that the Judge who presided at the trial, overruled a motion for a new trial, which was asked for on the ground that the damages were excessive ; expressing, at the same time, his decided opinion that the plaintiff was not entitled to vindictive damages. Although he regarded the damages awarded as high, he did not think them excessive, and clearly unauthorized by the evidence.

In the next place, it may be remarked that it is in some measure the fault of the defendant, if the jury, as well as this court, have not a more definite standard by which to estimate the damages sustained by the plaintiff. If, instead of taking off the slaves and employing them on another plantation, he had employed them on the place, in improving and cultivating it to the best advantage, and had administered it like a prudent father of a family, then the result of his administration would have furnished a fair measure of indemnity. But his management was not of that character. He employed much of the labor of the place on another tract of land, and even took away a part of the plant cane. The jury had, therefore, to ascertain, as well as they could, what might have been made on such a place, with prudent management, not only in crops, but in improvements with a view to future productiveness. It is shown that there were on the place about fifty hands, and that five hundred acres of land were under fence. Such a plantation, with good management, might yield, according to the statement of one witness, from five to ten hogsheads of sugar per hand, besides provisions and plant cane for the following year. It is true the plantation yielded very little under the management of the defendant, during the year he had control of it ; but that result furnishes by no means a just standard by which to estimate the damages due to the plaintiff.

The case was tried by a jury of planters, and their finding satisfied the Judge who presided at the trial ; and we do not consider the damages awarded so clearly excessive, as to authorize us to pronounce that the court erred in refusing to grant a new trial.

It is, therefore, ordered that the judgment first pronounced remain undisturbed.

JOSEPH ROUSSEAU and others, Heirs of Eulalie Rousseau, deceased, v. FRANÇOIS AMEDÉE TÊTE.

A vendee, in possession under a defective title, may suspend the payment of the price until secured against the danger of eviction; but he has no right to a rescission of the sale. C. C. 2535. But this article applies only to a vendee who has accepted the sale, and is in possession; not to one who discovers before accepting a deed or possession, that the vendor sold him what belonged to another.

The formalities prescribed for the sale of the property of minors, being exclusively for their benefit, the nullities resulting from their omission are purely relative, and the minors alone, after coming of age, can avail themselves of them. Such a sale is, consequently, not absolutely null.

An adjudication of succession property made and recorded by a Clerk of a Court of Probates legally appointed, is, of itself, a complete title. C. C. 2601.

Where it is expressly denied that one, who styles himself the Clerk of a Court of Probates, by whom an adjudication of succession property was made, is, or was such, the certificate of the Judge of the court, at the foot of the *procès-verbal* of the sale drawn up by such Clerk, in which he styles himself the duly commissioned Clerk of the court, that the copy is a true one from the original on file in his office, is insufficient to establish his appointment, there being no general law authorizing Probate Judges to appoint Clerks to their courts.

APPEAL from the District Court of Assumption, *Deblieux, J.*

MORPHY, J. The heirs of age, and the tutor of the minor heirs of the late Eulalie Rousseau, sue for the price of certain moveable effects, and for two instalments of the price of a tract of land, adjudicated to the defendant at a probate sale of the succession of their mother, made in the Parish of Assumption, on or about the 31st of October, 1840. The defence set up is, that the probate sale, and all the proceedings which led to it, are absolutely null and void, none of the formalities required by law for the alienation of property belonging to minors having been complied with. After stating a number of informalities, and, among others, that the tutors representing the minors had been appointed by the Judge without the advice and consent of a family meeting, and had given no security, and that the sale of the property was made by an unauthorized person, to wit, one Desiré Le Blanc, styling himself the Clerk of the Court of Probates, &c., the answer concludes by stating, that previous to the inception of this suit, the

defendant had tendered back the property to the plaintiffs, who refused to receive it, and by praying that the adjudication may be declared null and void, and the defendant released therefrom. There was a judgment below in favor of the plaintiffs, with stay of execution until good and sufficient security shall have been given by them, by public act, against the danger of eviction in consequence of any informalities in the probate sale of the property. The defendant has appealed.

The record shows, that in the proceedings which preceded the sale, and in the sale itself there were nullities, any one of which would be sufficient to avoid the sale in an action of revendication brought by the minors themselves; but the question here is, whether a vendee in possession under a defective title, can pray for a rescission of the sale; and whether, under the provisions of our Code, he can ask for anything more than the defendant obtained below, to wit, security against the danger of eviction.

The Civil Code nowhere recognizes in the buyer, the right of having the sale avoided on account of defects in his title; but provides, (art. 2535,) that if the buyer be disquieted in his possession, or has just reason to fear that he will be disquieted, he may suspend the payment of the price, until the seller has restored him to quiet possession, unless the seller prefer to give security. A defective title which does not vest in the buyer a legal right to the property, may well create in his mind a just reason to fear being disquieted, and authorize him to suspend the payment of the price until the seller gives him proper security; but it is no good ground on which to rest a claim for rescission. 11 Mart. 433. 1 Mart. N. S. 605. 3 Ib. N. S. 111. 7 Ib. N. S. 95.

It is true that in the case of *Pontchartrain Rail Road Company v. Durell*, 6 La. 484, this court held, that when the vendor sells property at public auction without title to a portion of it, the vendee to whom the adjudication is made, cannot be required to complete the sale and accept security, as the buyer is entitled to have all and every part of what he bought; but this decision was based on the ground that art. 2535 of the Civil Code, which only authorizes the vendee, fearful of eviction, to withhold the price until he receives security, applies to a buyer in possession, who has accepted the sale, and not to one who discovers before he ac-

cepts a deed or possession, that the vendor sold him what belonged to another. But where, as in this case, the purchaser has been in possession for more than two years, under a title which, however defective, he thought proper to accept, and under which he may never be disturbed, he has, in our opinion, no claim to rescission, and can only ask to be protected or secured against a possible eviction at a future time. But, moreover, the formalities which the law has established for the sale of property belonging to minors, being exclusively ordained for their benefit, the nullities resulting from the omission of some, or of all of such formalities, are purely relative, and the minors alone, when they become of age, can avail themselves of such nullities. They might find it their interest not to disturb the purchaser, but to receive from their tutor their proportion of the price, and thus ratify the sale originally void for the want of legal formalities. Pothier, Vente, No. 14. 7 Toullier, No. 564. 10 Mart. 281. 6 Mart. N. S. 355. A serious difficulty has, however, occurred to us in the examination of this case. The answer denies that Desiré Le Blanc, who made the adjudication, was the Clerk of the Court of Probates, or had any authority to make it. If he had been legally appointed Clerk of the court, he was fully authorized to make sales of succession property, under art. 2600 of the Civil Code; and the adjudication made and recorded by him, was a complete title. Art. 2601. But the only evidence of his appointment, which we can find in the record, results from the certificate of the Judge at the foot of the *procès-verbal* of the sale drawn up by Le Blanc, (in which he styles himself the duly commissioned Clerk of the court,) that such copy is a true one from the original on file in his office. The inference from such a certificate that this individual was really the Clerk of the court, is altogether insufficient, when the fact is expressly put at issue, and when there is no general law, that we know of, authorizing Probate Judges to appoint Clerks to their courts. If then, Desiré Le Blanc had no authority to make the sale, it would follow that there was no adjudication, and, therefore, no transfer of the property; and we should have been constrained to come to this conclusion, had the *procès-verbal* been signed by Desiré Le Blanc alone; but in this case, according to a usage which appears to prevail in the country, the *procès-verbal* of the

defendant had tendered back the property to the plaintiffs, who refused to receive it, and by praying that the adjudication may be declared null and void, and the defendant released therefrom. There was a judgment below in favor of the plaintiffs, with stay of execution until good and sufficient security shall have been given by them, by public act, against the danger of eviction in consequence of any informalities in the probate sale of the property. The defendant has appealed.

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cepts a deed or possession, that the vendor sold him what belonged to another. But where, as in this case, the purchaser has been in possession for more than two years, under a title which, however defective, he thought proper to accept, and under which he may never be disturbed, he has, in our opinion, no claim to rescission, and can only ask to be protected or secured against a possible eviction at a future time. But, moreover, the formalities which the law has established for the sale of property belonging to minors, being exclusively ordained for their benefit, the nullities resulting from the omission of some, or of all of such formalities, are purely relative, and the minors alone, when they become of age, can avail themselves of such nullities. They might find it their interest not to disturb the purchaser, but to receive from their tutor their proportion of the price, and thus ratify the sale originally void for the want of legal formalities. Pothier, Vente, No. 14. 7 Toullier, No. 564. 10 Mart. 281. 6 Mart. N. S. 355. A serious difficulty has, however, occurred to us in the examination of this case. The answer denies that Desiré Le Blanc, who made the adjudication, was the Clerk of the Court of Probates, or had any authority to make it. If he had been legally appointed Clerk of the court, he was fully authorized to make sales of succession property, under art. 2600 of the Civil Code; and the adjudication made and recorded by him, was a complete title. Art. 2601. But the only evidence of his appointment, which we can find in the record, results from the certificate of the Judge at the foot of the *procès-verbal* of the sale drawn up by Le Blanc, (in which he styles himself the duly commissioned Clerk of the court,) that such copy is a true one from the original on file in his office. The inference from such a certificate that this individual was really the Clerk of the court, is altogether insufficient, when the fact is expressly put at issue, and when there is no general law, that we know of, authorizing Probate Judges to appoint Clerks to their courts. If then, Desiré Le Blanc had no authority to make the sale, it would follow that there was no adjudication, and, therefore, no transfer of the property; and we should have been constrained to come to this conclusion, had the *procès-verbal* been signed by Desiré Le Blanc alone; but in this case, according to a usage which appears to prevail in the country, the *procès-verbal* of the

sale has been signed by the heirs of age, and by the tutors of the minors, and also by the defendant, and one Isoard, as his surety. This document may well be considered as a sale of the property on the part of the heirs of age, and it binds them in the same manner as if the adjudication had been legally made. As to the minors, they are in the same situation as if the heirs of age, and their tutors, had sold the property without complying with any of the formalities required by law; but, as we have already remarked, the omission of such formalities is only a relative nullity, of which they alone can take advantage. If, on attaining the age of majority, they find it to their advantage to abide by the sale, they may ratify it by receiving their proportion of the price. The sale, susceptible of being thus ratified, cannot be considered as absolutely void. The purchaser who, under the title, has now been in possession for more than three years, cannot obtain the rescission of the sale, but must be satisfied with being properly secured against the danger of eviction, according to art. 2535 of the Civil Code.

There is, however, in the decree of the court below, an error which must be corrected. The admissions in the record show, that the price of the moveables adjudicated to the defendant, and claimed in the petition, has been paid. This amount being deducted from the plaintiff's claim, leaves them entitled only to \$1088 46.

It is, therefore, ordered, that the judgment of the District Court be so amended as to entitle the plaintiffs only to one thousand and eighty-eight dollars and forty-six cents, with legal interest from the 1st of April, 1842, until paid, and that it be affirmed in all other respects; the costs of this appeal to be borne by the plaintiffs and appellees.

M. Taylor, for the plaintiffs.

Thibodeaux and Cole, for the appellant.

HONORÉ MANN v. MARCELIN MAJOR.

Where in an action on a note, defendant claimed a credit for a sum proved to have been paid to plaintiff, but the latter alleged that the payment was made in discharge of another debt: *Held*, that it was for the plaintiff to show that he was the holder of another obligation, which had been, or ought to have been credited with the amount.

Defendant, in answer to an action on his note, averred that plaintiff had received a certain other note to be collected from the endorser thereof, and the proceeds applied to the payment of the note sued on; that he had neglected to protest the note so given, thereby discharging the endorser; and that the amount of this note should be considered as so much paid towards the note sued on. Defendant annexed to his answer plaintiff's receipt, which stated that he had received the note "*à recouvrir contre P. J.*," the endorser. Defendant having offered witnesses to prove, that the note received by plaintiff was given in final discharge of the note sued on, the evidence was excluded below, on the ground that it was inconsistent with the receipt annexed to the answer. On appeal: *Held*, that the evidence should have been received.

APPEAL from the District Court of Point Coupée, *Deblieux, J.*
MARTIN, J. The defendant sued on his promissory note for \$500, resisted the claim, on the ground that it had been paid. He avers, that on the 20th of April, 1839, the plaintiff received from Pourciau, a note for \$203 50, to be collected from Joffrion, the endorser; that the plaintiff utterly neglected to have said note protested, and the endorser notified, whereby the latter has been discharged; that the plaintiff is bound to credit the defendant's note by the amount of that of Joffrion; and that the plaintiff has also received \$302 89, so that he owes to the defendant \$5 09, for which judgment is prayed.

The court admitted the payment of \$302 89, but rejected the pretensions of the defendant to the amount of Joffrion's note, and gave judgment for \$197 13, in favor of the plaintiff, reserving to the defendant any claim he may have against the former, in regard to Joffrion's note.

The defendant appealed; and the plaintiff has prayed, that the judgment may be amended, and given for the full amount of the defendant's note. A credit for the sum of \$302 89 was claimed, and allowed, on the plaintiff's receipt therefor, in part *payment of an obligation for a larger sum, of which he is the bearer.* His

counsel urges that the court erred, there being no evidence to connect this receipt with the defendant's note; and that the receipt was given in reference to another transaction between the plaintiff and defendant, which it would be difficult for him, at this distance of time to prove, and which he is not bound to do. The note sued upon was payable on the 1st of April, 1838, and the partial payment, evidenced by the plaintiff's receipt, is dated the 13th of May, 1838, about six weeks after the maturity of the note, which corresponds, in its amount at least, with that described in the receipt. It is impossible for the defendant to prove that the plaintiff held no other obligation of his than the note sued upon, which must be credited by the payment, unless the plaintiff holds another obligation of the defendant. If he do, he may easily prove it, and is bound to do it, because he cannot successfully resist the defendant's claim to a credit, unless he show, that there is in his hands another obligation, which has been, or ought to be credited with the amount.

The second credit was claimed on a receipt of the plaintiff to Pourciau, for a note of Joffrion's, to be collected. On this part of the case, the defendant's counsel relies on a bill of exceptions, which he took to the opinion of the court refusing him leave to introduce testimonial proof, that the note received by the plaintiff from Pourciau, was to have been taken in final discharge of the note sued on. The court rejected the testimonial proof, on the ground that it did not agree with the averments in the answer.*

The counsel for the defendant urges, that the court erred: 1st. In not considering the receipt given by the plaintiff on the 20th of April, 1839, for the claim against Joffrion, as a payment by the endorser, Pourciau, for the benefit of the defendant.

2d. In not permitting the defendant to prove that it was taken in payment, and that plaintiff lost its amount by his own neglect.

* The document annexed, to which allusion is made, was in these words:

"*Reçu de M. Pourciau une obligation de la somme de \$203 50 à recouvrir contre M. Paulin Joffrion. Pointe Coupée, 20 Avril, 1839. H. MANN.*"

The bill of exceptions recites, "that the defendant offered testimony to prove that a note for \$203 50 was to be taken by plaintiff, in final discharge of the note sued on, which testimony the court rejected as not agreeing with the documents in the answer.

Kittridge v. Landry.

On the first point, we are of opinion that nothing in the pleadings, or evidence, authorized the court to consider that Pourciau, the endorser of the note sued on, had given to the plaintiff the note to be collected from Joffrion, in discharge of the note for the payment of which he was liable, as it is pretended. Nothing shows this to be the fact. Pourciau gave the note, of which Joffrion was endorser, to the plaintiff, upwards of twelve months after the maturity of that now sued on, which is not shown to have been protested, so as to create any responsibility on Pourciau, as endorser.

But it appears to us, that the court erred, in refusing leave to the defendant and appellant to show, by testimony, that the intention of Pourciau in giving, and that of the plaintiff and appellee in taking the note of which Joffrion was endorser, on collection, was, that its proceeds, when collected, should be credited on the note on which the present suit is brought.

It is, therefore, ordered, that the judgment be annulled and reversed, and that the case be remanded for a new trial, with directions to the First Judge to permit parol evidence to be introduced of the intention of the plaintiff and appellee, in receiving the note on which Joffrion was endorser, to credit the proceeds of it, when collected, on the note now sued upon; and that he pay the costs of the appeal.

L. Janin, for the plaintiff.

R. N. and A. N. Ogden, for the appellant.

EBENEZER EATON KITTRIDGE v. EUGENE LANDRY.

Where there was error on the part of the vendor in delivering, and on the part of the vendee in receiving the possession of property sold, such possession cannot serve as a basis for the prescription of ten years, as where lands resold by a purchaser from the United States, having been erroneously located, the possession in conformity thereto was necessarily erroneous.

APPEAL from the District Court of Assumption, *Nicholls, J.*

Kittridge v. Landry.

Ilseley and Connely, for the appellant.

Bodin and M. Taylor, contra.

GARLAND, J. This case has been already before us, and in the opinion given in April, 1842, remanding it for a new trial, the pleadings, and much of the evidence, are fully stated. 2 Robinson, 72.

The plaintiff claims the land as being a portion of that purchased by André Le Blanc, in the year 1822, (mentioned in the first opinion, in the case of *Kittridge v. Breaud*, 2 Robinson, 40,) and derived from him, Le Blanc, by several mesne conveyances, his immediate vendor being Lazare Hébert. C. Mollère, under whom the defendant holds, purchased from the United States in August, 1824, eighty *arpens* of land in the rear of his front tract, which, in the month of January, 1826, he sold to the defendant, who immediately took actual possession thereof.

Sometime after the land was purchased by Mollère, at his request a survey was made by Grinage, a deputy Surveyor of the United States, who located it on the upper side and adjoining to the land of André Le Blanc, and ran the lines parallel with those of Bonnet, the Surveyor, who had laid off Le Blanc's land, in May, 1823. This survey was approved by Turner, the principal deputy Surveyor for the district, but the date of the approval is not stated. In the year 1829, or 1830, a general survey of the township was made, and the lines run by Bonnet and Grinage were disregarded, and the boundaries of the different claims changed; yet each individual obtained the quantity he had purchased. The house and principal improvements of the defendant were, by this last survey, thrown upon the land in controversy, and beyond the line he claims. In April, 1833, the defendant, Le Blanc, and others, entered into an agreement before a Notary, in which they stipulated, that, as among themselves, they would be bound by and adhere to the line as established by Bonnet and Grinage. All parties remained in possession until May, 1836, when Le Blanc and wife, and Hébert, sold to the plaintiff. In the act of sale from the latter vendor it is agreed, that if any of the buildings of the defendant shall be found on the land sold, he shall have permission to take them away. About this time a survey was made of the tract of land sold by Le Blanc and Hébert to the plaintiff,

Kittridge v. Landry.

and the Surveyor ran the lines as now contended for by the latter, which showed that the defendant was below the line fixed by the United States Surveyors, of which it appears he was informed. In January, 1837, the plaintiff took possession of the property purchased by him. Shortly after, the defendant requested a neighbor to call on the plaintiff, and to endeavor to get him to rent him (defendant) the land in controversy. The plaintiff consented, and soon afterwards, meeting the defendant in company with the witness, it was verbally agreed that the defendant should keep the land, at the usual rent for cleared land in that part of the country. The defendant also moved his buildings and improvements from the land, and put them on another place. He kept possession up to the time when this suit was commenced, acknowledging to different persons, that he had rented the land from the plaintiff. But the contract of lease was never reduced to writing; nor has it been shown, that any rent was ever paid. It is proved, that the defendant showed the line run by the last Surveyors, as that between him and the plaintiff, and that he only cleared land up to it after plaintiff took possession. But, sometime before the commencement of this suit, the defendant claimed the land he was in possession of, as his own, and forbade the plaintiff's overseer from cutting fire-wood or timber on the premises.

At the time of the trial it was agreed, that the question of title only should be investigated, reserving those in relation to improvements, damages, &c. There was a verdict in favor of the defendant for the land, and one in favor of the plaintiff against Hébert, his vendor, for \$3000. The latter applied for a new trial, which was granted as to him; but the plaintiff made no such application, and judgment was rendered against him, and he has appealed. The cause was subsequently tried as between the plaintiff and Hébert; and, at the spring term, 1843, of the District Court, a verdict of \$1500 was given against the latter, who again obtained a new trial. At the October term, 1843, another trial was had, when a verdict was given in his favor; and, as the judgment now stands, the plaintiff loses the land by that in favor of the defendant, as well as his recourse on his warrantor. From this judgment he has also appealed.

The counsel for the defendant has again argued nearly all the

points the case originally presented, and insists very strongly on the binding effect of the act passed before the Notary, Materre, in April, 1833, although it is not recorded. He has attempted to prove that the plaintiff is the *ayant cause*, or assignee of André Le Blanc, and that, as to him, there is no necessity for recording the act. The real facts of the case seem to have escaped the attention of the counsel; for the record shows, that André Le Blanc sold the land in controversy, in October, 1822, to Guillaume Mollère, who, in November, 1827, sold it to Joseph Campo; he, in July, 1828, sold it to Lazare Hébert, who, in May, 1836, sold to the plaintiff. Neither G. Mollère, Campo, nor Hébert, are parties to the act passed in April, 1833, and it is clear, that André Le Blanc could not bind them in relation to a piece of land he had sold more than ten years previously. It is, therefore, unnecessary for us to go again into the question of the recording of that act, as it is too clear to admit of controversy, that the plaintiff is not bound by it. The fact is, the plaintiff did not purchase any of the land he claims, of André Le Blanc. The front tract was bought of Madame Le Blanc, separated in property from her husband, and owning the land in her own right.

The remaining question in the case is the plea of prescription. We have seen, that in the month of April, 1825, Celestin Mollère had the land surveyed by Grinage. There is no date to the approval of this survey, and it was not made in conformity to the acts of Congress, as it does not place the back concession in the rear of the front tract, as we have said must be done in every case where it is practicable. Celestin Mollère purchased the land claimed by the defendant, from the United States, before any survey was made. He had, therefore, no location by metes and bounds, until the survey in April, 1825, by Grinage, which, although approved at some unknown period, by the principal deputy Surveyor, was, in 1829, or 1830, entirely disregarded by the Surveyor General and other public officers, when a location was made of the land owned by the defendant, from which it does not appear that he has ever appealed to the General Land Office or to Congress. The defendant has submitted to it, and whenever he shall apply for a patent for his land, we have no doubt that it will be issued in conformity with the survey made in 1829, and

Kittridge v. Landry.

not with that made by Grinage, in 1825. The latter location being erroneous, and the possession in conformity to it consequently so, it cannot be the basis for the prescription of ten years. In the case of *Babineau v. Cormier*, 1 Mart. N. S. 456, this court said, if there be error on the part of the vendor in delivering the property sold, and error on the part of the vendee in taking possession, the latter cannot hold by the prescription of ten years. The same principle was again recognized in the case of *Broussard v. Duhamel*, 3 Mart. N. S. 16. See also, Pothier, *Traité de la Possession*, chap. 4, No. 40. *Troplong de la Prescription*, No. 254. In 1829, when the public surveys were made, the defendant knew that there was an error as to the boundaries within which he possessed, and that the title, which he held from the United States, was not complete and legal. For four years he submitted to the change made in the lines ; and he has not, to this day, so far as we are informed, complained of the action of the officers of the United States. Since the plaintiff purchased the land from Hébert, the defendant has, on different occasions and in various modes, acknowledged his title ; the strongest evidence of which is, the fact of agreeing to rent the land, and the removing of his buildings, which it was stipulated in the act of sale that he should do. These facts might possibly amount to a tacit renunciation of an acquired prescription, as they are calculated to raise a presumption of the relinquishment of the right acquired by it ; but it is not necessary to decide this question, as we do not think the prescription was acquired when the suit was commenced. Civil Code, art. 3424.

On a full examination of the case, we are of opinion, that the court and jury erred in giving a judgment and verdict for the defendant, and we must reverse and annul them.

It is, therefore, ordered that the judgment in favor of the defendant be annulled and reversed, and that the plaintiff, Kittridge, recover of the defendant, Landry, the land in controversy, to wit, twenty-one and fifty-nine hundredths superficial acres ; and it is further ordered, that this cause be remanded to the District Court, for the purpose of being proceeded in and tried according to law, in relation to the improvements, damages and other questions, in conformity with the agreement of the parties ; the defendant pay

Kittridge v. Dugas.

ing the costs of this appeal, and those in the District Court up to the time of filing this decree ; such as may accrue subsequently to abide the final decision.

EBENEZER EATON KITTRIDGE v. JEAN DUGAS.

No title to any portion of the public lands of the United States can be acquired by prescription.

APPEAL from the District Court of Assumption, *Deblieux, J. Connely*, for the appellant.

M. Taylor, for the defendant.

GARLAND, J. This case was before us two years ago. 2 Robinson, 85. In the opinion then given, the facts are fully stated. We then remanded the cause for a new trial. It was again tried by a jury, on precisely the same facts as were proved when the case was before us, and a verdict was rendered in favor of the defendant for \$52 damages, and for the land in dispute, from which the plaintiff has again appealed.

This case is a much stronger one in favor of the plaintiff, than that against Eugene Landry, just decided. Both parties hold under the purchasers from the United States. The plaintiff claims under a purchase made in 1836, the land being then represented as belonging to the public domain. The defendant holds under Charles Maurin, who purchased in April, 1822. He was never legally put into possession of the land so purchased, until about the year 1829, or 1830, when his land was laid out in conformity to law, and in the manner now insisted on by the plaintiff. The reliance of the defendant on the survey made by Grinage, cannot avail him. It was a private survey, not approved by any authorized officer, nor was it made in such a manner as the act of Congress, under which Maurin purchased, directed that it should be. It did not locate the back concession in the rear of the front tract, as was the plain intention of the law ; but placed it so as to make it run in the rear of two other tracts in the vicinity. The surveys

Kittridge v. Dugas.

made in 1829, and 1830, were in conformity to law, and the defendant was bound by them. The act executed in April, 1833, before Materre, the notary, cannot affect the rights of the plaintiff. The defendant and his neighbors cannot, by an act among themselves, deprive the United States of the land in the rear of Madame Breaud's tract; nor can the plea of prescription be opposed to them. Until 1836, the land claimed by the plaintiff was public, and the defendant had not a shadow of title to it. The land sold to Maurin, the defendant's vendor, has been properly laid out, by extending the side lines of the front tract in the same courses, until a sufficient depth is reached, to give a quantity in superficial acres equal to the front tract. To this land the defendant is entitled, and that claimed by the plaintiff does not interfere with it.

The judgment and verdict are, in our opinion, erroneous, and must be reversed.

It is, therefore, ordered and decreed that the judgment be annulled and reversed, and the verdict set aside, and that the plaintiff be quieted in his possession of the land claimed in his petition according to the boundaries fixed by the general survey made by the United States Surveyors, and represented on the township map; and that the defendant be inhibited and enjoined from trespassing on the same. It is further ordered, that for the purpose of trying all questions in relation to damages, fruits and improvements, the case be remanded to the District Court, to be proceeded in according to law; the defendant paying the costs of the appeal, and all the costs in the inferior court to the time of filing this decree; those which may subsequently accrue, to abide the final decision of the case.

THOMAS WELSH v. THOMAS RODNEY SHIELDS and another.

An overseer, whose services have continued during one year, and a part of the second, has, under art. 3184 of the Civil Code, § 1, a privilege on the crop of the second year, valid against a third person, who purchases during the second year the plantation and crop then in the ground. The privilege, which had been acquired before the sale, could not be divested by it. Such a privilege is not required to be recorded, in order to preserve it. C. C. 3226, 3243.

No dilatory exception can be pleaded after a judgment by default. Act 20th March, 1839, § 23.

APPEAL from the District Court of Terrebonne, *Deblieux, J.*
J. C. Beatty, for the appellants.

Stevens and Thibodeaux, for the defendant.

SIMON, J. This is a suit brought by an overseer against his employer, for the amount of his salary. The petition states, that the defendant, Shields, owes the plaintiff the sum of \$900, for his services, as an overseer on Shields' plantation, during the year 1841; that said plantation has been lately transferred and delivered into the possession of R. R. Barrow, the other defendant, who has it in his possession, as well as the whole crop raised thereon during the year 1842; and that the petitioner has in law, a lien on the crop taken off in 1842, as well as on all the stubble cane which may be in the ground, to secure the payment of his claim. He prays, that the crop of 1842, and the stubble cane growing on the plantation, to a value sufficient to satisfy his claim, may be sequestered; and that he may have judgment, with privilege on the property sequestered, &c.

Shields did not answer, and a judgment by default was taken against him. The other defendant, Barrow, joined issue, alleging that he purchased the plantation and crop of his co-defendant, in the year 1842; that the plaintiff has no lien or privilege on the crop and stubble cane sequestered; and that if the plaintiff ever had any privilege, it is lost and prescribed, &c.

Judgment was rendered below in favor of the plaintiff, against Shields, for the sum of \$900; and the plaintiff's claim against Barrow was rejected, denying him the privilege prayed for. From this last judgment, the plaintiff has appealed.

Welsh v. Shields and another.

The evidence shows, that the plaintiff was an overseer on Shields' plantation, during the year 1841, and part of 1842; and that he was, at the time the testimony was taken, (April, 1843,) still overseer on the same place; that his wages were \$900; that the plaintiff was employed on the same plantation, in 1843, by Barrow, who was in possession as owner; and that \$900 was a fair rate for the wages of such an overseer as the plaintiff, in 1841. It is further established that the writ of sequestration, issued in this case, was executed during the rolling season of 1842; that Barrow was then in possession as owner; that 40 hogsheads of sugar, being part of the crop of 1842, and 50 *arpens* of stubble cane, then in the ground, were sequestered.

The decision of this cause depends, in a great measure, on the construction of art. 3184, § 1, of the Civil Code, which is in these words: "The debts which are privileged on certain moveables, are: 1st, *the appointments or salaries of the overseer for the year last past, and so much as is due of the current year, on the product of the last crop, and the crop at present in the ground.*" This article supposes, that there may be cases in which an overseer, who has made a crop on a plantation, may continue to be employed on the same plantation for a part of the following year. In such a case, where his salary has not been paid for the preceding year, and any part of his wages for the current year be due, the law allows him a privilege on the proceeds of the last crop, and on the crop which is in the ground at the time that his services are interrupted or ended. 3 Robinson, 216. This is exactly the case under consideration, except that in this case, the privilege is sought to be exercised against a third person, who during the second year, not only purchased the plantation, but also the crop then in the ground. Hence, the question is presented, can this circumstance deprive the plaintiff of the privileges which he had legally acquired, at the time of the sale of the place? Besides the general object of the law, which is to secure to overseers the payment of their salaries, there are certain circumstances which show, that the right set up by the plaintiff is resisted on mere technical objections, and that advantage is sought to be taken of his situation, and of the confidence which he may have had in his new employer. If this be true, equity, at least, cannot permit that his

right should be infringed or defeated. The circumstances alluded to are, that the defendant, Barrow, after having bought the place, kept the plaintiff in his employ as overseer; that the latter finished the crop for Barrow's account, and continued to act for him as overseer for the year 1843. It is true, no claim is set up for 1842; but when Barrow purchased the place in 1842, the plaintiff's privilege on the crop then growing, had already been acquired, for the security of the amount due him for the last preceding year. In answer to this, it is said, that Barrow had no notice of there being any privilege claimed for an overseer's salary. But how can this be a ground for depriving the plaintiff of his right? The law does not require that such a privilege should be recorded. Civil Code, art. 3243 and 3226. The plaintiff's privilege existed on the growing crop at the time of the purchase by Barrow, by the mere effect of the law. Until the sale of the plantation, with the crop then in the ground, the latter belonged to Shields, against whom the right could be exercised. This Barrow must have known, as no one can be presumed to be ignorant of the law. He was aware that a privilege might exist on the growing crop, in favor of the overseer, for the current, and for the preceding years; and it was, perhaps, his duty to inquire and ascertain at the time of the sale, whether the crop that he was then purchasing, was affected with this kind of privilege. This he might easily have known, from the very person whom he kept in his employment; and who, perhaps, unaware of the purchase, had no notice to give of the existence of a right which the law secured, and which he had long before acquired.

With this view of the question, we must come to the conclusion, that the plaintiff did not lose his privilege by the transfer of the place to another person; that the defendant, Barrow, purchased the crop, subject to the right previously acquired by the plaintiff; and that the inferior court erred in not allowing the latter the exercise of his privilege.

As to the dilatory exception insisted upon by the defendant's counsel, we think it cannot avail him. It was filed too late, as a judgment by default had been previously entered. Act of 20th March, 1839, § 23. Bullard & Curry's Digest, p. 157.

It is, therefore, ordered, that, as it respects the defendant, Bar-

Lacour v. Landry.

row, the judgment of the District Court be annulled, and reversed; and that the amount of the judgment rendered below against the defendant, Shields, in favor of the plaintiff, and unappealed from, be satisfied, by privilege, out of the proceeds of the property sequestered in due course of law, with the costs of both courts.

ANTOINE LACOUR v. CAMILLE LOUIS LANDRY.

A purchaser, disquieted in his possession by a third person's setting up title to the land, of whose claims he was uninformed before the sale, may withhold the price until quieted in his possession, unless the vendor prefer to give security. C. C. 2535.

APPEAL from the District Court of Iberville, *Deblioux, J.*

Labauve, for the appellant.

Edwards, for the defendant.

BULLARD, J. Lacour, the appellant, sold to Landry, a plantation, situated partly in the parish of Iberville, and partly in that of West Baton Rouge. At the time of the sale, it appears that two suits were pending in the latter parish, instituted by the vendor against Trahan and Valère, who were encroaching on his land, and disturbing his possession. It does not appear that the existence of these suits was known to the purchaser, Landry, at the time of the sale. After the sale they were dismissed, by order of Lacour; and the same persons continuing to interfere with Landry's possession, and to disturb him, he instituted suits against them and others, and called on his vendor to assist him as warrantor, in making good his title.

In the meantime, the vendor sued out an order of seizure and sale on the mortgage and vendor's privilege, to obtain a part of the price which had become due. Landry procured an injunction to stay the proceedings, on alleging the facts above set forth, which was maintained, provisionally, until the pending suits shall have been decided. Lacour has appealed.

Lacour cannot complain, if we take his own statement for the nature and extent of the disturbance which induced him to bring

 Ternant, Tutrix, v. Boudreau.

the first suits, and which were dismissed after his sale to Landry. In his petition, in the case of *Lacour v. Trahan*, he complains, not only that the defendant had committed trespass on his land, but that he had slandered his title; and he concludes by praying that the defendant may be compelled to produce his title, and that his own title may be decreed to be good, and that he may be quieted in his possession. This is essentially a petitory action.

The primary obligation of the vendor is to maintain the buyer in quiet possession of the thing sold; and if the latter be disquieted, he has a right to withhold payment of the price, unless the vendor prefers giving security. Civil Code, art. 2535.

When the purchaser is obliged to commence judicial proceedings against a person disturbing his possession, he is bound to notify his vendor of the action he is commencing; and, in case of condemnation, the vendor will be obliged to indemnify him. Ib. 2495.

The court, therefore, did not err in maintaining the injunction.

Judgment affirmed.

VIRGINIE TERNANT, Natural Tutrix of the Minor Children of
Vincent Ternant, deceased, v. EVARISTE BOUDREAU.

The provisions of the ancient laws in force in this State concerning the distinction of things into holy, sacred and religious, and the nature and inalienability of those things, having been abolished by art. 447 of the Civil Code, those mentioned in the 5th Partida, law 15, title 5, as religious, sacred, or holy, may now be alienated as any other property.

Ornaments of gold and precious stones deposited in a tomb with the body of the deceased, are corporeal things, (C. C. 451,) susceptible of ownership, (C. C. 480,) subject to be taken possession of by the rightful owner, the heir of the deceased, and to be alienated by him.

A sale by the heir of all the moveable and immoveable property of a succession, and of all the rights which he has or may have thereto, places the vendee in the situation in which the heir stood at the death of his ancestor, and entitles such vendee to claim articles of gold and precious stones deposited in the tomb of the ancestor. It is the sale of a succession, which includes all the rights and obligations of the deceased as they existed at the time of the death, or which have since accrued, or may subsequently arise, without exception. C. C. 869, 870. Such arti-

 Ternant, Tutrix, v. Boudreau.

cles are an integral part of the inheritance, and the heir cannot claim them against the vendee of the succession, on the ground that the latter had no intention, at the time of the sale, of purchasing, nor the former of selling them.

APPEAL from the District Court of Pointe Coupée, *Deblieux, J.*

L. Janin, for the appellant. The only question in this case is, whether the articles found in the tomb of the defendant's mother, were comprehended in the sale of his hereditary rights. That they were, see *Troplong, Vente*, vol. 2, No. 961. Such a sale conveys not only the actual, known property, but all contingent and unknown rights. The articles so found were ordinary property, not sacred or holy. Civil Code, art. 447.

T. J. Cooley, for the defendant. The act of sale is but the evidence of the contract between the parties; the contract or agreement being the substance.

The contract or substance must be sought in the mutual, or common intention of the parties, rather than in the literal sense of the terms used in the act of sale. Civil Code, art. 1945, 1954. *Pothier, Obligations*, part 1, chap. 1, Nos. 85, 86, 98. *Duranton*, vol. 10, Nos. 505, 506, 507, 510. *Merlin, Diction. verbo, Convention*, § 5 and 7 première règle.

Equity and usage serve to supply incidents or stipulations to contracts. Civil Code, art. 1959, 1960.

A jewel placed in a tomb with a dead person, should be considered as out of commerce, and so destined to be; and as not susceptible of sale. *Moreau and Carleton's Partidas*, vol. 2, p. 670. Code of 1808, p. 348, art. 16. Civil Code, p. 378, art. 2423. *Toullier*, vol. 6, No. 157, et seq. *Troplong, Vente*, No. 222.

SIMON, J. The present action was instituted under the following facts and circumstances, detailed in the petition, and all admitted in the answer: *Dorothée LeGros* deceased, the late wife of *Vincent Ternant*, having been interred in a brick tomb, constructed in the grave yard attached to the church of *St. François* of *Pointe Coupée*, all her jewelry, consisting of diamonds, set in various manners, and other ornaments in gold, were put into her coffin. It appears that on the night of the 17th of January, 1843, certain individuals named *Conner*, forcibly broke into the tomb, opened the coffin, and took therefrom the greater part of the jewelry. While attempting to sell it, they were arrested, and indicted.

ed for larceny, before the Criminal Court of New Orleans: On being arraigned, Adolphe Conner pleaded guilty, and was sentenced to four months imprisonment. A considerable portion of the jewelry was found on the person, or in the possession, of Conner, and surrendered by him; and the jewelry so received was put into the possession of the Clerk of the Criminal Court, with directions, from the Judge of the said court, to deliver the same to the party who should show title thereto.

The defendant, who is the only child of Madame Ternant, claims the jewelry as sole heir of his mother; and the plaintiff, the widow of the late Vincent Ternant, and natural tutrix of his children and heirs, claims it by virtue of a purchase of the defendant's hereditary rights, made from him by her deceased husband.

The evidence shows, that Dorothée LeGros married Vincent Ternant in February, 1827, and made a marriage contract; that she died in 1835, and on the 26th of August, of that year, the defendant sold all his hereditary rights to his stepfather by a notarial act, on the terms of which, it is contended by the plaintiff's counsel, the decision of this cause depends. This act shows, that the defendant sold "*tous les droits, prétensions, noms, raisons et actions, appartenant et qui pourront appartenir audit sieur vendeur dans la succession de feu dame Dorothée LeGros, décédée épouse dudit sieur Vincent Ternant, et mère dudit sieur vendeur, lesdits droits consistant principalement en ses appêts dotaux, tels qu'ils sont énumérés au contrat de mariage, entre ladite feu dame Ternant et ledit sieur son mari, suivant acte au rapport de feu F. Dormenon, en date du 13 Février, 1827; ledit sieur vendeur transférant toutes les propriétés mobilières et immobilières, argent, et autres actifs mentionnés audit acte, comme aussi tous les droits et prétensions, que peut avoir ledit vendeur, en vertu dudit contrat de mariage, s'en dessaisissant en faveur dudit sieur acquéreur, et lui donnant en outre bonne et finale quittance de tous autres droits qu'il pourroit exercer contre lui pour raison du mariage,*" &c.

The price or consideration of the purchase was a sum of \$30,000, payable in five equal instalments, "*au moyen de quoi, le sieur vendeur cède et transporte au sieur acquéreur tous les droits, noms, raisons, actions, et privilèges et hypothèques géné-*

Ternant, Tutrix, v. Boudreau.

ralement quelconques, qu'il a et peut avoir et est habile à exercer en sa qualité susdite contre toutes personnes et toutes propriétés qu'elles puissent être, pour par lui faire et user desdits droits, et se mettre en possession de toute propriété mobilière et immobilière dépendante de ladite succession, comme de chose à lui bien et légitimement appartenant en vertu des présentes," &c.

The price was paid according to the terms of the contract, and on the 5th of June, 1838, the defendant gave a final notarial receipt to Ternant for \$30,000, being the price of "*la vente des droits succesifs du sieur, comparant en sa qualité d'héritier de feu Dorothée Le Gros, sa mère,*" &c.

It may be proper also to remark that the marriage contract alluded to in the sale of the hereditary rights, stipulates a separation of property and contains an inventory and estimation of the property of the wife, among which we find this article: "*Les hardes, linges, habits, bijoux à l'usage &c., estimés ensemble, \$2000,*" and another clause that in case of the dissolution of the marriage, "*quant aux habits, linges, hardes et bijoux à l'usage, &c., la future épouse aura la faculté de les reprendre en nature,*" &c.

The record also shows, by the admissions of the parties, that the jewelry and diamonds mentioned in the plaintiff's petition were the separate property of Madame Ternant, *previous to her marriage with Ternant*, or were given to her at the time of her said marriage; that the tomb in which the remains of the defendant's mother lie, is not protected in such a manner as to prevent the breaking of it, if the jewelry in contest should be replaced therein; and that it would only be a temptation to evil doers to break open the tomb, &c.

The jewels left in the possession of the Clerk of the Criminal Court, consist of the following articles, to wit; a gold chain, a gold buckle, a pair of diamond earrings, two diamond rings, a gold ring, (*ulliance*,) two gold rings, two broken rings, and six small diamonds; and the jewelry in the possession of the defendant, found in the tomb after it had been broken open, and when he caused the tomb to be repaired, consists of a diamond necklace.

The inferior court rendered judgment in favor of the defendant,

declaring him to be the owner of the above articles of jewelry ; and from this judgment the plaintiff has appealed.

The only question presented in this case, is, to whom do the jewels in controversy belong ?

On the part of the plaintiff, the sale of the defendant's hereditary rights above recited, general in its terms, is relied on as giving the vendee a clear and indisputable title to the property.

And, on the part of the defendant, it is contended, that the jewels in dispute never werẽ intended to be sold by him to Ternant ; that the latter never intended to buy them ; that the substance of the contract must be sought in the mutual or common intentions of the parties, rather than in the literal sense of the terms ; and that the objects placed in the tomb of the deceased, should be considered as out of commerce, and so destined, and not susceptible of sale.

The last ground of defence is clearly untenable. By art. 447 of the Civil Code, the provisions of the ancient laws concerning the distinction of things into things holy, sacred, and religious, and the nature and inalienability of these things, were abolished ; and therefore the things mentioned in the law 15th, tit. 5, Partida 5, as being religious, sacred or holy, may now be subject to be sold or alienated as any other kind of property. It is true, however, that the jewels which were put in the tomb of the defendant's mother, were destined to remain there ; and that although they never became a part of the monument, it may be fairly presumed if they had not tempted the covetousness of evil doers, they would never have been disturbed. They may have been placed there in compliance with the last wishes of the deceased, or from other causes which it is unnecessary to inquire into ; but although concealed in the bottom of a grave, and perhaps protected only by the respect which the living are naturally disposed to bear to the ashes of the dead, it cannot be denied, that they were corporeal things (Civil Code, art. 451) within the domain of ownership, (Ib. art. 480,) and therefore subject to be taken possession of by the rightful owner, (the heir of the deceased,) and to be by him sold or alienated. If, however indecorous, and even infamous, the act might have been, the heir of the deceased had claimed those jewels, or taken them in possession, who could, under our laws, have

 Ternant, Tutrix, v. Boudreau.

disputed his right? The right of ownership belonged to him, and no one could have prevented him from exercising it in its fullest extent. The condemnation of the thief by the Criminal Court, shows also, that the jewels were considered there, as *the personal goods of another*.

With this view of the character of the property in dispute, it is clear, from the facts disclosed by the record, that the jewels were the property of the defendant at the time they were put in his mother's grave, and that they never ceased to be so, even while they remained in the tomb, unless they be considered as included in the sale of hereditary rights made by the defendant to Ternant. This is the main, nay, the only question in this case.

The sale above recited, comprises all the rights and pretensions of the defendant to the inheritance of his mother's estate, all the property moveable and immovable, *toutes les propriétés mobilières et immobilières*, left by the deceased, and extends even to contingencies and derivative rights. Nothing is excepted, and it puts the vendee in the same situation in which the heir stood at the time of the death of his ancestor. It is the sale of a succession, (*hérédité*), which, according to arts. 869 and 870 of the Civil Code, not only includes the rights and obligations of the deceased, as they existed at the time of his death, but all that has accrued thereto since its opening; or, in other words, the right by which the heir can take possession of the estate of the deceased such as it may be. Troplong, vol. 2, No. 961, says that such a sale "*comprend non seulement ce qui existait au moment que l'hérédité s'est ouverte, mais encore tout ce en quoi elle consistait à l'époque où la vente s'effectue. On doit y faire entrer non seulement ce qui a augmenté l'hérédité, mais encore ce qui doit l'augmenter un jour; non solum quod jam pervenit, sed et quandoque pervenerit. Dig. L. 2, § 4, De Hæred. vel. Act. Vend. Troplong proceeds: "Enfin, le vendeur doit tenir compte à l'acheteur des effets de la succession, qu'il a aliénés avant la vente de l'hérédité, car à moins de clauses contraires, la vente de l'hérédité englobe tout ce que cette hérédité embrassait à l'instant même où elle s'est ouverte."* See also, Pothier, Vente, No. 529, who says, "*quand on vend l'hérédité d'un défunt, on vend tout ce qui en est provenu et proviendra.*" Now, how can it be said, that the jewels in dispute

ought not to be considered as included in the sale under consideration, and that they must be taken as distinct from the objects sold, when the objects sold, are *the rights of a vendor to a succession* of which the jewels necessarily form a part? It is urged, that the vendor did not intend to sell, and that the vendee had no intention of buying the jewels; but they were an integral part of the inheritance sold in a lump, though concealed in a tomb, and it would be as correct to say, that if a purchaser of an inheritance were, at the time of the sale, under the erroneous impression that one of the effects belonging thereto was permanently lost or destroyed, the heir could subsequently claim it, on the ground that the purchaser did not know that it existed, and had no express intention of buying it; nay, this is exactly an analogous case. Again, as Troplong says, "*la vente de l'hérédité englobe tout ce qu'elle embrassait à l'instant même de son ouverture,*" without any exception or distinction; even the unknown or contingent rights attached thereto or derived therefrom; and we are unable to conclude, that the defendant is entitled to claim and keep as his, the articles of jewelry which form the subject of this controversy. They belong under the sale, to the heirs of the purchaser.

It is, therefore, ordered, that the judgment of the District Court, be annulled and reversed, and that ours be for the plaintiff, who, as natural tutrix of her children, the heirs of Vincent Ternant, deceased, is hereby declared to be the owner of the several articles of jewelry which form the subject matter of this suit. The costs in both courts to be paid by the defendant and appellee.

WILLIAM F. MOONEY, and another, v. JAMES CAGE.

Where experts, appointed by the Court, are not shown to have been sworn, and their report does not appear to have been homologated, it may be contradicted by other evidence.

A prayer, by the appellee for an amendment of the judgment, filed the day before the case was called for argument, and after a joinder in error, is too late. C. P. 890.

APPEAL from the District Court of Terrebonne, *Nicholls. J.*

Mooney and another v. Cage.

J. C. Beatty, for the plaintiff.

Connely, for the appellant.

GARLAND, J. This action is to recover the sum of \$2468 85, with legal interest, for making a quantity of bricks on the defendant's plantation, and laying them in the erection of the walls of a sugar house, and other buildings. The petitioners allege, that they made and burned 718,520 bricks; and that they used in erecting the walls of the sugar house, and overseer's house, 721,680, besides some used in the erection of a chimney, and for other purposes. For making the bricks, they claimed one dollar per thousand; and for laying them, one dollar and seventy-five cents per thousand. Compensation is also claimed for extra work on different buildings. It is said, that a written contract was entered into, which the defendant has in his possession, and refuses to deliver, or give a copy of. An account is, therefore, filed, and the value of the labor and services claimed.

The answer, after a general denial, avers, that the defendant employed the plaintiffs to do all the brick work on the sugar house, except the *setting* of the kettles; but that they abandoned the work and refused to complete it, in consequence of which, the defendant was obliged to employ one John M. Brooks to finish it, whereby, from the increased price he was obliged to give, and the delay, damage to the amount of \$1000 had accrued, which he claims. It is further denied, that the plaintiff ever performed the quantity of work charged, or that there was any amicable demand for settlement or payment. The defendant alleges, further, that the written contract is lost or mislaid, and that the prices charged exceed those mentioned in it. He avers, that the measurement made was *ex parte*; and he prays the court to appoint experts to measure it. He further avers, that payments to the amount of \$957 23 were made, and that an agreement was entered into to defer the payment of any other sum for one year, from the date of the last receipt; which period not having elapsed, the suit was declared to be premature, and its dismissal asked for.

On the application of the defendant, two experts were appointed to measure the work done by the plaintiffs, one selected by each party.

In a supplemental answer, the defendant interrogated the

plaintiff as to certain payments made by him, and whether they had not agreed as to the number of bricks in a certain kiln. The plaintiffs answered, that there was no such agreement, and admitted the payment of various sums, for which the defendant has credit.

On the trial, the written contract was produced by the defendant, who alleged that he had found it a few days before. It provides that the plaintiffs are to make as many bricks as the defendant shall require, to construct the sugar house and other buildings, and also, "to lay the bricks, and make the sugar house and other buildings, on such plan" as the defendant may direct. After various clauses, it provides how the openings, (the doors and windows,) are to be calculated in making the measurement, and recites, that it is alleged by the plaintiff to be usual to charge an extra price for chimneys, and a ratio is fixed, by which the extra price is to be calculated, if the custom be shown. The *setting* of the sugar kettles is specially excluded from the contract. The prices for making and laying the bricks, are those mentioned in the petition. It is also agreed, that the payment of the money is not to be deferred longer than the 1st of April, 1843; and the amount is to bear interest at eight per cent, from the 1st of January in that year, if not previously paid.

The experts appointed by the court, reported their measurement and calculation of the number of bricks in the sugar house, and overseer's house, at 698,463. Pelton, one of the experts, who is a planter, says, that the report shows their mode of proceeding; that they measured all the work shown them by Hillman, and that, including the foundation of a bell house, the whole number of bricks is 725,721, the work done by Brooks not included. The testimony of Grinage, the other expert, accords with that of Pelton. In explanation they say, that they calculated sixteen bricks to the cubic foot, relying upon the correctness of Nicholson's tables. Neither of the experts were brick-masons or mechanics; but had seen a great deal of brick work, and had had it done for themselves. The plaintiffs offered the testimony of a brick-mason, who had followed the business since the year 1806. He says that he accurately measured the work, and made the calculations; and that he furnished the statement upon which the

claim of plaintiff is based. He states, that he measured accurately, with a line; while it appears from the evidence of the experts, that they used a pole, supposed to be ten feet in length, but which was afterwards found not to be exactly accurate. The testimony of the witness who says, that he accurately measured the work is sustained, in various particulars, by another workman who was employed to work on the building. The testimony of other witnesses was given, to prove the manner in which the work was executed, the payments made by the defendant, and other circumstances connected with the case, which it is not necessary now to detail. The cause was submitted to a jury; and, after hearing all the facts, a verdict for \$1213 was given for the plaintiff, upon which judgment was rendered, after the refusal of a new trial. The defendant has appealed. During the trial, the plaintiffs offered, as a witness, the workman who had measured the work, for the purpose of proving the correctness of their account. The defendant's counsel objected to his testimony, on the ground, that, as experts had been appointed by the court to measure and report on the work, their report was final and conclusive on the plaintiffs, and that the plaintiffs could not make their *ex parte* acts evidence on their behalf. The court overruled the objections, and admitted the testimony. We do not think the Judge erred. Article 441, and the following one, of the Code of Practice, designate the cases in which experts, auditors, &c., may be appointed; and define their duties and powers, and the objects of such appointments, the principal of which is, to get facts and information in such a shape as will best inform the court of the true state of the case. Article 433 directs the return of the report to the Clerk, in order that either party may have it homologated; and article 456 shows the steps necessary to effect that object. The experts in this case do not appear to have been sworn before proceeding to discharge their duty; nor were any steps taken to homologate their report. It was, therefore, nothing more than the statement of the witnesses, and might be contradicted. The evidence of Ament was properly admitted.

The second bill of exceptions was taken to permitting the plaintiffs to use the deposition of Wm. Winchester, as evidence. The objection was, that certain interrogatories, propounded by the de-

fendant, had not been sent with the commission, and that no answer had been obtained to them. It appears that the plaintiffs made out their interrogatories, and had a copy of them served on the defendant. Some days after, the defendant filed, in the Clerk's office, a number of interrogatories in the same case, but did not specify, on the face of the paper, nor in any other manner, that they were intended as cross-interrogatories to those filed by the plaintiffs; the Clerk, therefore, supposed that the defendant intended to take out a separate commission, and did not forward his interrogatories with those of the plaintiffs, when the commission to take Winchester's testimony was sent. Subsequently, in consequence of the continuance of the cause, defendant sent a commission to take Winchester's evidence, propounding, in substance, the same questions as those filed with the Clerk. This deposition was used on the trial, and the defendant had the benefit of the answers of Winchester, in as ample a manner as though his questions had been forwarded in the first instance. No injury resulted from the omission to send the questions in the first instance, and its not having been done, is, in a great measure, imputable to the loose mode in which the business was conducted by the defendant, or his counsel. Under these circumstances, we think the deposition was properly admitted in evidence.

We have looked into the merits of the case, and carefully examined the testimony, to see if any material error has been committed, to the prejudice of the defendant; and find no sufficient reason either to reverse the judgment, or to reduce the amount. We think that the jury have come very near what is right, and have dealt fairly with the parties.

The plaintiff has asked us to amend the judgment, so as to allow him legal interest from judicial demand. This we cannot do. It was not found by the jury, nor allowed in the inferior court; nor was the application to amend filed in proper time in this court, having been presented only the day before the cause was called for argument, and after a joinder in error. Code of Practice, art. 890.

Judgment affirmed.

SAMUEL F. HILLMAN v. JAMES CAGE.

APPEAL from the District Court of Terrebonne, *Nicholls, J.*

J. C. Beatty, for the plaintiff.

Connely, for the appellant.

GARLAND, J. This suit is brought to recover the sum of \$770 06, for work as a brick mason, performed by the plaintiff on the sugar house mentioned in the case of *Mooney and another v. Cage*, just decided, and for making a number of bricks, not mentioned in that case. The principal part of the work charged, is for building chimnies to the sugar house, paving the molasses cisterns, constructing the engine walls, altering parts of the work previously performed, and finishing the establishment.

The defendant denies that he contracted with the plaintiff to do the work, but avers, that he contracted with John M. Brooks to do it, and that Hillman was employed by him. He alleges, that there is no privity of contract, and that the suit ought to be dismissed. It is denied that the work was properly executed, and alleged that the prices charged are too high.

In the answer of the defendant to the petition of *Mooney and another*, he states, that he had been obliged to employ Brooks to do this work, as they would not do it, and that he had been obliged to give an additional price. In the contract it is stated, that the customary price for building chimnies to sugar houses is higher than for laying bricks in an ordinary wall. The evidence shows, that the work was performed. Some of the charges are shown to be too high. It appears that *Mooney* and his partner quitted the work on the sugar house, because the defendant did not furnish the materials for them to go on; and that after Brooks was engaged to do the work, he employed Hillman and transferred his contract to him, not being able to perform it. Brooks says, that it was understood, or agreed, that the defendant was to pay the plaintiff for the work, and that he has no claim upon the former for it. The defendant has used the buildings, and there is no evidence of the work not having been properly executed.

The jury gave a verdict for the plaintiff for \$733, making a de-

Becnel v. Tournillon.

duction from the sum claimed. From the judgment rendered on this verdict, the defendant has appealed.

It is very certain that the defendant has had the benefit of the plaintiff's labor and services. He does not show that he ever paid Brooks any thing for the work. He knew that the plaintiff was engaged on it; and we cannot doubt that he understood then, that he was to pay him, and not Brooks. The defendant contends, that as the plaintiff did the work, he should not charge more for laying bricks than the price mentioned in the contract with Mooney and his partner, as, by it, all the brick work was to be performed by them. After the failure of the defendant to furnish materials to those contractors, and their leaving the place, it does not appear that he ever called on them to return; and his entering into an engagement with another, might well induce the belief that all parties considered the contract at an end. An examination of the testimony satisfies us that the jury has arrived at a just conclusion.

Judgment affirmed.

LESIN BECNEL v. JULIEN TOURNILLON.

The act of 13th March, 1827, relative to bills of exchange and promissory notes, does not change the general commercial law in regard to the diligence to be used in serving notices of protest, but merely provides a new mode of proving such diligence. This law cannot be understood as pointing out the degree of diligence to be used. It merely instructs the notary how to proceed, where the endorser resides in another place than that of the protest, leaving him to ascertain where the notices are to be addressed.

A notice of protest simply directed to an endorser as in a particular parish, where there are several post offices in the parish, and the one at the seat of justice of the parish is not the nearest to his residence, is insufficient.

APPEAL from the District Court of Assumption, *Deblieux, J.*

SIMON, J. The defendant is appellant from a judgment which makes him liable, as endorser, for the amount of a promissory note protested for non-payment by the Parish Judge of the parish of St. John the Baptist, where the drawer of the note resides.

The record shows, that the Parish Judge notified the endorser "by two notices in writing of even date with the protest, which he put, on the day of the protest, in the post office of his parish, addressed to the endorser; the one at Donaldsonville, and the other at the parish of Assumption."

It is established by the evidence, that the defendant is a resident of the parish of Assumption; that there are three post offices in said parish, one of which is at Towncourtville; that from the defendant's to the latter post office, the distance is about three miles; and that the nearest post office to the defendant's, is that at Towncourtville. An attempt has been made to show, that the defendant gets his mailed letters at the Donaldsonville post office; but the testimony does not go further than to prove the fact that the defendant lives with his father, and that the witness has seen newspapers brought there, from Donaldsonville, for his father. The witness, who is a notary, adds, that whenever he had official notices to give to the defendant, he addressed them to him at the Towncourtville post office, which is the nearest to the defendant's house.

It is contended by the appellee's counsel, that the notice is sufficient, as it was directed to the defendant's place of residence, "Assumption;" and as, by the terms of the law of 1827, (Bullard & Curry's Digest, p. 43, § 14,) notices of protest are to be addressed to the endorsers, at their *domicil* or *usual residence*.

It is true, the law referred to, which, as we have often said, does not change the usage of the commercial law in relation to the diligence to be used in serving notices of protest, but merely provides a new mode of proof of such diligence, (7 La. 11. 3 Robinson, 166,) provides, that "whenever an endorser shall not reside in the town or city where protest shall be made, then it shall be the duty of the notary to put into the nearest post office where the protest is made, a notice of such protest to the endorser, addressed to him at his *domicil* or *usual place of residence*." This law, however, has never been understood, and, in our opinion, cannot be understood as pointing out the degree of diligence to be used, or as changing, in any manner, the usages of the commercial law in relation to the extent of such diligence. It only instructs the notary how to proceed when the endorser resides in

another place, leaving to him to ascertain where the notices are to be addressed, as the domicil or place of residence of such endorser. So, in the case of *Nott's Executors v. Beard*, 16 La. 310, we held, that the law requires notaries to put the notice in the nearest post office to them, and that the law is satisfied by its being directed, as to the drawer or endorsers, to the post office nearest to them. So, also, in the case of *Gale v. Kemper*, 10 La. 209, it was held, that a notice of protest is properly directed to the post office nearest to the residence of the endorser, where there are more than one in the parish; and in the case of the *Union Bank v. Brown*, 1 Rob. 107, we recognized the doctrine, that notice of protest to an endorser, when sent by mail, must be directed to the post office nearest his residence, where it is not shown that he was in the habit of receiving his letters from another office. So it was held, also, in the case of the *Mechanics and Traders Bank v. Compton et al.*, 2 Robinson, 4; and in the case of *Mead v. Carnal and Bryce*, ante, 73.

From the uniform jurisprudence established in all the cases above referred to, it is obvious that we never entertained the idea that a simple direction of the notice to the parish in which the endorser resides was sufficient, unless, as was shown in the case of *Gale v. Kemper*, 10 La. 209, the post office be kept at the seat of justice, where the letters, generally addressed "to —, parish of —," are always sent, and it is proved to be the nearest to the endorser's residence. This is in accordance with the rules of the commercial law, with regard to the manner of serving notices of protest. Again, the law of 1827, has not operated any other change, but points out a new mode of proof of the diligence required to be used by the commercial law. Here, one of the letters, addressed to "the parish of Assumption," was undoubtedly sent to the seat of justice, according to the post office regulations; and the evidence shows, that the Towncourtville post office is nearest to the defendant's residence. The notice should, therefore, have been directed to him at the latter place.

We are aware of the great inconvenience which notaries generally labor under, when they have to make a protest in a parish far distant from the residence of the endorsers; and of the difficulty which they experience in discovering or ascertaining the

exact post office to which the notices are to be forwarded. This difficulty sometimes amounts to an impossibility, and it often happens, that the endorser is discharged for want of sufficient means of ascertaining, by the notaries, to what particular post offices the notices must be addressed. This is an evil which, perhaps, should be remedied; for, although, as we said in the case, 16 La. 310, post offices are establishments authorized by the laws of the United States, and our public officers are, perhaps, bound to recognize such as are established in our own State at least, and although notaries may sometimes get their information from the holders of the notes and bills to be protested, still, those means are often insufficient, as it is generally difficult to know or ascertain the distance which there may be between the house of the endorser, and the different post offices that may have been established in his parish. But, however inconvenient and injurious this may often be to our public officers, and citizens in general, it is an evil which our legislature alone can remedy; and so long as the law shall stand as it now is, on this subject, our duty must be to obey it, and to say, as we have done repeatedly, that a notice of protest, simply directed to a particular parish, and not addressed to the post office nearest to the endorser's residence, in case there are several post offices in the parish, and the one at the seat of justice is not the nearest, is insufficient, and cannot legally bind the endorser.

It is, therefore, ordered and decreed, that the judgment of the District Court be annulled and reversed, and that ours be for the defendant, with costs in both courts.

M. Taylor, for the plaintiff.

Ilisley, for the appellant.

SUCCESSION OF PIERRE FRANÇOIS OYON.—LOUIS JEAN BAPTISTE AUGUSTIN BLONDELEE, and others, appellants.

A law should never be considered as applicable to cases which arose previous to its enactment, unless the Legislature have, in express terms, declared such to be their intention.

The 4th section of the act of 26 March, 1842, imposing a tax of ten per cent on all sums, or on the value of all property, received by any non-resident alien, as heir, donee, or legatee, from any succession opened in this State, or on so much thereof as is situated in this State, applies only to successions opened, by the death of the ancestor, subsequently to the passage of the act.

APPEAL from the Court of Probates of Lafourche Interior, *McAllister, J.*

MORPHY, J. The petitioners, aliens and residents of the kingdom of France, have appealed from a decree of the inferior court, homologating an account rendered by the defendant, as administrator of the succession of the late Pierre François Oyon, who died in the parish of Lafourche Interior, on or about the 20th December, 1835. They contend, that as heirs at law of the deceased, they have been wrongfully and unjustly charged in said account with the tax of ten per cent imposed by the law of the 26th of March, 1842, on property inherited by non-resident aliens; that this law should not be made to apply to successions opened before its promulgation; and that their rights as heirs having vested in 1835, they are not liable to the payment of this tax. We think that the Judge erred in subjecting the appellants to the payment of the tax. It is a sound rule of construction, never to consider laws as applying to cases which arose previous to their passage, unless the Legislature have, in express terms, declared such to be their intention. They might, indeed, have imposed a tax on all sums to be paid over to aliens not residing in the State, without reference to the opening of the successions from which they may be entitled to receive such sums; but unless that intention is clearly and unequivocally expressed, we are bound to suppose that, according to the ordinary rules of legislation, they intended to provide for the future, and not to affect in any way rights previously acquired. The language of the law is "that each and

Succession of Oyon—Blondelee and others, appellants.

every person not being domiciliated in this State, and not being a citizen of any State or Territory in the Union, who shall be entitled, whether as heir, legatee, or donee, to the whole, or any part of the succession of a person deceased, whether such person shall have died in this State or elsewhere, shall pay a tax of ten per cent on all sums, or on the value of all property which he may actually receive from said succession, or so much thereof as is situated in this State," &c. We understand this law as referring only to aliens who may become entitled to the whole, or any part of a succession, after its promulgation. When did the petitioners become entitled to the sums they claim? Surely not in 1843, when they came forward to receive them; but in 1835, when the succession was opened by the death of their ancestor. A law imposing a similar tax was passed by the General Assembly in 1828, but was repealed in 1830. The heirs of one Arnaud, who presented themselves after the passage of the repealing act to receive their inheritance, contended that, as the law imposing the tax had been repealed, they were no longer liable to pay it; but this court held, that the right of the State to the tax having accrued by the opening of the estate of Arnaud under the law of 1828, was not affected by its repeal. 3 La. 336. See also, same volume, p. 561. Laws of 1828, p. 178. We would surely not decide otherwise under the law of 1842, if, after its repeal, aliens should come forward to claim a succession opened while it was in force. If so, we must hold that the tax is due only by such aliens as have become entitled to successions opened in this State after the promulgation of the law.

It is, therefore, ordered, that the judgment of the Court of Probates of the parish of Lafourche Interior, be so amended, as to reject from the defendant's account the item charging the appellants with ten per cent on the amount accruing to them from the succession of the late Pierre Francois Oyon; and that it be affirmed in all other respects. The appellee to pay the costs of this appeal out of the funds of the estate.

B. Winchester, for the appellants.

J. C. Beatty, District Attorney, for the State.

SUCCESSION OF PIERRE FRANÇOIS OYON.—BENJAMIN WINCHESTER, Attorney in Fact of Anne Josephine Virginie Patrix and others, appellant.

APPEAL from the Court of Probates of Lafourche Interior, *McAllister*, J.

MORPHY, J. This case presents the same question as that just decided on the appeal of Louis Jean Baptiste Augustin Blondee, and it must be decided in the same way.

It is, therefore, ordered, that the judgment of the Court of Probates, of the parish of Lafourche Interior, be so amended as to reject from the defendant's account the item charging the appellants with ten per cent on the amount accruing to them from the estate of the late Pierre François Oyon; and that it be affirmed in all other respects. The appellee to pay the costs of this appeal out of the funds of the estate.

M. Taylor, and *B. Winchester*, for the appellant.

J. C. Beatty, District Attorney, for the State.

ANDREW MCCOLLOM v. JOHN MCCOLLOM.

A purchaser of a tract of land and slaves, who has been evicted as to one-third of the property, has a right to have the sale cancelled *in toto*, and to be relieved from the payment of the price. C. C. 2487.

APPEAL from the District Court of Ascension, *Nicholls*, J.

M. Taylor, for the plaintiff.

Connely, for the appellant.

BULLARD, J. The plaintiff asserts title to one undivided third of a tract of land containing two thousand acres, and the improvements thereon, and to five slaves, and some moveable effects appurtenant to the plantation, which he acquired by purchase from one Bishop, jointly with Williams and Rightor, by an act of sale which was duly recorded in the parish of Pointe Coupée, in

which the land is situated. He further represents, that the Marshal of the United States for the Eastern District of Louisiana, under color of an execution against his co-proprietors, Williams and Rightor, issued from the Circuit Court of the United States, seized and sold the whole of said tract of land, when the defendant, John McCollom, became the purchaser thereof, and was put in possession. He prays for judgment for one undivided third, and the revenues.

The defendant answers, that he purchased the whole of the property at the Marshal's sale, in virtue of a *fiery facias* in the case of *Eager v. Williams and Rightor*, and that, in the event of his eviction, he is entitled to his recourse against both the aforesaid parties. He, therefore, prays, that Eager, as well as Williams and Rightor, may be cited in warranty; and that, in case of his eviction, the bond given by him for the property now in the hands of Eager, may be cancelled, and for general relief.

Rightor, in the meantime, intervened, and alleged the nullity of the Marshal's sale, on the grounds, that the formalities required by law were not complied with, the advertisements being defective in time and form; that the property was not sold at the seat of justice of the parish of Pointe Coupée; that the bid made by the defendant, was not for a sufficient amount to cover the special mortgages; and that some of the slaves were not produced at the place of sale.

Eager, the judgment creditor, at whose suit the property had been sold, being an absentee, a curator, *ad hoc*, was appointed to represent him, who answered, that if the plaintiff ever had any title to the property, it never had been legally recorded, so as to operate as notice to third persons. He denies that the Marshal seized any property of the plaintiff, but alleges, that he seized and sold only the right, title and interest of Williams and Rightor; and he avers, that the bid made by the defendant was considered to be for so much over and above the special mortgages.

The court below gave judgment in favor of the plaintiff for one undivided third of the property, cancelled the Marshal's sale *in toto*, and decreed that the bond given by the defendant to secure the payment of the purchase money should be annulled. Eager, the judgment creditor, has appealed.

The case has been submitted to us without any argument whatever.

The Marshal's return upon his writ shows, that he seized two thousand acres of land, five slaves, and some personal property as belonging to Williams and Rightor. His deed purports to convey the same property. But it is shown, that the joint title of the plaintiff, and Williams and Rightor, was recorded in the parish of Pointe Coupée, and the defendant clearly acquired only the right, title, and interest of the latter by the Marshal's sale.

The defendant being thus evicted of one-third of the property purchased by him, has a right to demand that the sale be cancelled for the whole, and to be relieved from the payment of the price. Civil Code, art. 2487.

Judgment affirmed.

PIERRE PAUL BABIN v. JOHN NOLAN.

All the effects which the spouses reciprocally possess at the time of the dissolution of the marriage, are presumed to be common effects or gains, unless they satisfactorily prove which of such effects they brought into marriage, or have been given to them separately, or they have respectively inherited. C. C. 2374.

To ascertain, after the dissolution of a matrimonial community, the increase or improvements in the value of the hereditary property of either of the spouses, during the marriage, from the common labor or expense, the proper course is, to estimate the value of the property at the time of the dissolution of the community, in the situation in which it was at the date of the marriage, and its real value, with all the improvements existing thereon, at the time of such dissolution; and the difference between the two estimates will form the increased or improved value, to one half of which the other spouse will be entitled, on the settlement of the community. C. C. 2377.

A court, by whom experts have been appointed, is not bound to adopt their report. Any error in it may be corrected; another report may be ordered; or, rejecting the report altogether, the court may adopt any conclusion which the evidence, adduced contradictorily by the parties before the experts, or before the court, may warrant and justice require. C. P. 442, 451, 453, 461.

Proof that a husband received a certain sum during the existence of the community, in payment of a debt due to him individually, is not sufficient to charge the community with the amount, when there is no evidence that the community was benefited by it, or that it was used in the purchase of community property.

A crop, made after the dissolution of the community, by the husband, on land be-

Babin v. Nolan.

longing to him, partly with his own slaves, and partly with those of the community, cannot be considered as belonging to the community, nor be included in its settlement before the Probate Court. The husband is bound to account to the heir for the value or proceeds of the labor of the slaves, having acted as his *negotiorum gestor* in the administration of his property; but this has nothing to do with the settlement of the community. The action of the heir, must be brought before the ordinary tribunals.

APPEAL from the Court of Probates of West Baton Rouge,
Favrot, J.

SIMON, J. This case was before us last year, (4 Rob. 278,) and was remanded for further proceedings, for the purpose of ascertaining the value of such increase and ameliorations in the defendant's land, as may have been the result of common labor, expenses and industry, during the existence of his marriage with the plaintiff's sister, in conformity with the following rule, adopted by us, under art. 2377 of the Civil Code. We said, in our previous opinion, "that the safest rule to be pursued would be, *first, to put an estimate upon the value of the naked property, if unimproved at the time of the marriage, or to estimate it according to its value at the time of the dissolution of the community, but, if possible, in the situation in which it was at the time of the marriage; and then to inquire into the real value of the hereditary property, with all the improvements existing thereon, in the condition in which it was at the time of the dissolution of the community; and that the difference between the two estimations should form the increase, for one-half of which the other spouse should be compensated in the settlement of the community, according to the article above quoted.*"

We were of opinion that by following this rule, it would be easy to ascertain how far the increase in value of the naked property could be attributed to the ordinary course of things, to the rise in value of property, or to the chances of trade; since its estimation according to its value at the time of the dissolution of the community, in the situation in which it was at the time of the marriage, would necessarily include its increased value, due to anything else but to the common labor, expenses, or industry of the spouses, during the existence of the marriage.

After this case was returned to the inferior tribunal, experts were appointed to appraise the property in conformity with our

decree, one of whom, (James McCalop,) was chosen by the defendant; another, (S. M. D. Clark,) was selected by the plaintiff; and a third, (Villeneuve Le Blanc,) was appointed by the court to act as umpire, in case the other two should not agree. The experts were severally sworn, and proceeded to comply with the order of the court, after having been put in possession of a statement giving the description of the property to be appraised, in the presence of the attorneys of both parties, who respectively declined offering any testimony; and after having examined the premises, being unable to agree in opinion as to the value of the property, they submitted their different reports to the consideration of the court, *a qua*, in substance as follows:—McCalop reported that he could not value the land and improvements at a larger sum than \$3000, an *arpent* front, cash, making in all the sum of \$24,000. He ascertained, that the land was worth, *when the defendant was first married*, the sum of \$16,400, in cash, and established the difference, (\$7600,) as being the enhanced value of the property, (including the improvements,) since the marriage until the time of the report.

S. M. D. Clark declared in his report, that he believed the property, with the improvements, to be worth, in cash, \$17,000. He fixed the value of the land, *at the time of the marriage*, at \$16,000, cash, and allowed the difference (\$30,400,) as being the present increased value of the property, produced by improvements: and V. Le Blanc, acting as umpire, concurred in opinion with Clark, concluding that the improvements, at the dissolution of the marriage, placed on the property by the community, were worth \$30,600 being the difference between the value of the land in July, 1841, and what it was worth, *at the time of the marriage*, to wit, \$16,400.

The defendant excepted to the report of the experts on numerous grounds, some of which it is unnecessary to notice, but among which we find the following: 1st, That the plaintiff, having produced no evidence to show what improvements were made on his (defendant's) land, during the community, the experts were bound to presume that the improvements which they were called upon to appraise, belonged to the owner of the soil.

2d. That the report of McCalop is based upon the valuation of the improvements on the 5th of June, 1843, and the purchase price of the land in the year 1822; and does not show whether the enhanced value was the result of those improvements, or of the natural rise in the property.

3d. That the expert, Clark, values the property, on the 5th of June, 1843, at the sum of \$47,000, and assumes the value of the property, *at the time of the marriage*, at \$16,400, allowing the difference between the two sums, as being the present increased value of the property, produced by improvements, without showing what enhanced value the improvements gave to the property, or whether such value was the result of a natural rise in the value thereof.

4th. That the valuation given to the improvements, including the land, by the expert, Clark, and the umpire Villeneuve, is exorbitant and unjust; and that the same would not sell, in cash, for more than the value of the land and improvements, as fixed by the report of the expert, McCalop.

On the trial of this cause on the defendant's exceptions to the report of the experts, the experts were examined as witnesses, for the purpose of showing the basis of their respective reports. McCalop stated, among other details, that the enhanced value of the property, at the time he was called upon to make the appraisal, including the improvements, was the difference between the price it originally cost, reduced to cash, (\$16,400,) and \$24,000. That his knowledge of the value of the defendant's property, *at the time of his marriage*, and the improvements thereon, is derived from the views he took of the sales. He values the plantation at \$3000 per acre, front, including it as it now stands. The value of the land is not enhanced in proportion to the value of its improvements; and the full amount of improvements is never paid for, in selling a piece of land. He adds, that the selling price of lands, such as the defendant's, is now from \$1500 to \$3000 per acre front, by 80 deep; and that on the day he met with the other expert at the defendant's, for the purpose of appraising the improvements, there were a great number of witnesses attending, but that none of them were sworn.

S. M. D. Clark testified, that in estimating the value of the

buildings on the plantation, he considered what they were worth on the place as they are, and did not appraise them according to their probable cost. He took the average crops as being the interest, at ten per cent, of what he considered the true value of the plantation. In the situation it now is, *with the buildings thereon*, he considers this land, *the front and back tracts*, to be worth \$60 per *arpent*, and something upwards. He would consider the cleared land, without the buildings, to be worth, in cash, at least \$50 an *arpent*. He further said, that in estimating the defendant's residence, he did not consider its original cost, but he estimated it as he would an ordinary residence, sufficient for such a plantation; and he considers Le Blanc as one of the most competent persons the court could have appointed as umpire in this case. In another statement of the same witness, he goes on to give a detail of the manner in which his appraisement was made, and of the reasons by which he arrived at the conclusion by him adopted.

V. Le Blanc's testimony shows, that he estimated *the front tract, with all its improvements*, at \$4500 per *arpent* front, by 40 deep, making \$36,000; and *the double concession, at the rate of \$35 per superficial arpent*, making \$10,500; and that the difference being small, he concluded to take Clark's estimation as his own. He considers this appraisement as very moderate. He did not estimate the property, as to its value at the time of defendant's marriage. He has known the property since 1814, and *the buildings now on it, have all been erected since defendant's marriage*. He gives a detail of the improvements; says they are very valuable, the most valuable he himself knows of in the State; *values the front tract, without the buildings and improvements, at the rate of \$50 the superficial arpent*; considers that the value of this property did not increase in proportion to the value of its buildings, because they are of no use at all; and in estimating the value of the plantation, he did not take into consideration the value of the pigeon houses, ice houses, and paling.

With this evidence before him, the Judge, *a quo*, took the report of the expert, Clark, and umpire, Le Blanc, as the basis of his judgment; ordered that the difference between the price of the land, *at the time of the marriage*, viz., \$16,400, and the price of the appraisement mentioned in the report, viz. \$47,000, be de-

creed to constitute the value of the improvements belonging to the community, to be equally divided between the parties, and gave judgment accordingly. From this judgment the defendant has appealed.

The only real questions which this case presents, grow out of such of the defendant's exceptions to the report of the experts, as we have noticed. We shall, therefore, follow the same course in bringing them under our consideration.

I. The defendant cannot pretend here, to be the owner of the improvements, although the tract of land on which they are erected, has been shown to be his individual property. It is a well known rule, that "at the time of the dissolution of the marriage, all the effects which the spouses reciprocally possess, are *presumed common effects or gains*, unless they satisfactorily prove which of such effects they brought in marriage," &c. Civil Code, art. 2374. Here, it is true, the defendant has established that the land belonged to him, by virtue of a purchase made previous to the marriage; but it is also in evidence, that it was unimproved at the time of the marriage, and the witness Le Blanc says, that the buildings now on the plantation *were all erected thereon after the defendant's marriage*. Besides, this part of the plaintiff's claim was not disputed when the case was first before us. The defendant's claim was then limited to keeping his own land; the improvements were inventoried as community property; and it was not then pretended, that those improvements should belong to the owner of the soil. The soil itself would be presumed to be common property, if the defendant had not shown his title to it previous to the marriage, and he cannot claim the improvements thereon existing, unless he proves that they were there anterior to such marriage. This exception was properly overruled.

II. III. IV. These exceptions are so closely connected together, that they form but one question, to wit, did the experts act, and is their report made, according to the rule and principles recognized in our former judgment?

We have already expressed our views upon what we understand to be a correct interpretation of the rule adopted by us, and upon what we considered to be an exact compliance with it; and it seems, from the proceedings had by the experts, and by the inferior court, that it was, if not overlooked, greatly misunder-

stood. It is clear, that the report of the experts, and the judgment appealed from, are based upon the estimation of the property according to its value *at the time of the marriage*; and that the increase of the said property was ascertained, not by the difference between the value of the naked land *at the time of the dissolution of the community*, and its real value with all the improvements existing thereon at the same period, but by that between its value *at the time of the marriage*, and its valuation at the time that the experts acted. This is incorrect, as it is obvious, that this mode would necessarily include among the improvements, whatever enhanced value may be derived from the ordinary course of things, from the rise in the value of property, or from the chances of trade. We are at a loss to conceive what difficulty may have been found below, in pursuing the course pointed out by our first judgment. It is very simple, resolving itself into the following questions, to be answered by the experts, or by the evidence adduced by the parties.

First. What was the condition of the property at the time of the marriage?

Second. What would be the value of such property at the dissolution of the community, in the state in which it was at the time of the marriage?

Third. What was the real value of the said property, with all the improvements existing thereon, in the condition in which it was at the time of the dissolution of the community?

Fourth. What is the difference between the two estimates?

These questions are not answered by the report of the experts. They resorted to the sales, to ascertain the value of the land at the time when the defendant was married. They did not put any estimate upon it, according to its value at the period the marriage was dissolved. They did not consider its real value according to what it would have been worth with all the improvements *at the time that the community ceased*: but simply struck the difference between the price which the property had originally cost, reduced to cash, and the valuation thereof, with its improvements, on the 5th June, 1843, nearly two years after the dissolution of the community. It is true, the umpire, Le Blanc, says, that in estimating the value of the plantation, he would not take into consideration

the value of certain useless improvements, put on the place since the death of the defendant's wife. This was correct, as the community has nothing to do with such improvements, which ought to be for the defendant's own account. But as the estimation of the property and improvements is before us, in a very unsatisfactory and incomplete state, and as the evidence, somewhat confused and contradictory, is not such as to enable us to do justice to both parties, by ascertaining the exact amount of increase of the property during the marriage, this case must again be remanded, with instructions to the Judge, *a quo*, to conform to the rules and principles established in this, and in our former opinion.

We said in our first judgment, that the exact value of the increase or improvements in controversy, should be ascertained by experts, or by testimony. This was only pointing out the means to be resorted to, for the purpose of obtaining correct information on the point under consideration; but neither of the parties was precluded from producing other testimony, particularly as the court, not being bound to follow the opinion of the experts, was legally authorized to correct any error existing in their report, or to order another report to be made by the experts, or even to reject the report altogether, and adopt such other conclusion as the evidence adduced contradictorily by the parties before the experts, or before the court, should warrant, and the justice of the case should require. Code of Practice, arts. 442, 451, 458, 461.

With regard to the sum of \$600, which the defendant complains was not allowed to him by the inferior court, we think it was properly rejected. It is true, the evidence shows that a sum of \$600 was paid to the defendant during the marriage, as being the proceeds of a mortgage debt due to him by the purchaser of a negro woman mortgaged to secure it; but nothing proves that the community ever was benefitted by it, or that it was used in the purchase of any community property.

Having thus disposed of the questions presented by the judgment homologating the report of the experts, we shall now proceed to examine certain proceedings which were had in the court below, in relation to the crops made on the plantation since the dissolution of the community, and the judgment rendered thereon on

the 20th of November, 1843, from which the defendant has also appealed.

It appears that the plaintiff, having vainly attempted to make an inventory of the crop made on the plantation in 1842, (those of 1840 and 1841 having already been inventoried,) was obliged to apply to the court, *a qua*, for a writ of sequestration. This was granted, and the crop, such as it was found in the sugar house, was taken possession of by the Sheriff in due course of law. In the meantime, an injunction was granted and issued at the suit of the defendant, to stay the execution of the judgment first rendered by the Court of Probates and affirmed by this court, so far as the object of the execution enjoined was to obtain the satisfaction of the sums of money due to the plaintiff under said judgment, on the ground that no final settlement of the community had ever been made, and that the same was yet in suspense and undetermined, &c.

The defendant excepted to the sequestration on the grounds :

1st. That the court, *a qua*, has no jurisdiction to order an inventory of property, held and owned by a third person in his own right, and as a *negotiorum gestor*, and to issue a writ of sequestration against the crop made on the plantation in 1842; and that the plaintiff, if he has any claim to set up on said crop, or to the hire of his slaves in working the same, ought to resort to the courts of ordinary jurisdiction against the defendant as a *negotiorum gestor*.

2d. That there has been no legal affidavit made by the plaintiff to entitle him to obtain a writ of sequestration, &c.

These exceptions were overruled, and the defendant having offered to file his answer to the merits, permission to do so was refused by the lower court, to which opinion of the court he excepted.

On the same day that the answer was presented to be filed, the injunction obtained by the defendant was made perpetual; and the parties having then agreed to postpone the investigation and settlement of the accounts relative to the several crops, &c., until the first Monday of September following, at which time all said accounts were to be filed, no further proceeding was had until the 2d of October following, when the plaintiff obtained a rule on the defendant to show cause why, on the 9th of the same month, the

plaintiff should not be permitted to take his share of the moveables and immoveables belonging to the community. On the day last mentioned, the plaintiff obtained another rule on the defendant, to be allowed to take in kind his share of the said moveables and immoveables, which rule was subsequently answered by the defendant, who made opposition thereto, mainly on the ground of the insufficiency of funds belonging to the community to pay the debts and charges thereof.

On the same day, the defendant offered to file his account and vouchers in support thereof, and asked for a rule on the plaintiff to show cause, *within three days*, why said account should not be homologated. This was refused by the court, which stated in the bill of exceptions, that it was the opinion of the court, that if the defendant had made the necessary expenditures to produce the crops, *on proof thereof, they should be allowed*. Whereupon, the plaintiff proceeded to take down his testimony, and the defendant and his counsel, all left the court of their own accord, and did not appear any more in the course of the trial.

The trial proceeded. A good deal of testimony was heard and reduced to writing; and after a full investigation of the matters in controversy, the court, *a qua*, liquidated the nett proceeds of the crops to be equally divided between the parties; ordered the slaves and moveable property of the community to be divided in kind; the several tracts of land to be sold according to law, to operate a partition thereof; and provided for the subsequent division of the crop of 1843, according to the rights of the parties thereto.

From the view we have taken of the exception of the defendant to the jurisdiction of the Probate Court, with regard to the crop of 1842, raised on his land after the death of his wife, it necessarily results that all the proceedings had on the sequestration are null and void.

It is clear, that the crop of 1842 cannot be considered as belonging to the community formerly existing between the defendant and his deceased wife. It was made after her death, on the land of the defendant, partly with his own slaves, partly with those of the plaintiff, and partly with those of the community. The defendant is bound to account to the plaintiff for the value or pro-

ceeds of the labor of the slaves which he had inherited from his sister, having acted as the plaintiff's *negotiorum gestor* in the administration of his property. But the community having ceased to exist in 1841, it follows, that any subsequent use of the common property by the defendant, to the prejudice of the plaintiff, by keeping the whole in his possession and under his administration, makes him liable to compensate said plaintiff for the profits or revenues which he would have derived from the property inherited, if the same had not continued in the defendant's possession. Again ; the defendant, acted as the plaintiff's agent, and, as such, he must account to him for all the consequences of his agency, and reimburse him his proportionate share of the revenues made with the property. But this has nothing to do with the settlement of the community. The situation of the community is established by the inventory made and closed on the 1st of February, 1842, which includes only the crops of 1840, and 1841 ; and the right of action which the plaintiff may have against the defendant in relation to the crops of 1842, and 1843, cannot be merged in the present suit, and included in the settlement of the community, but must be exercised before the ordinary tribunals. Again ; the community has ceased to exist, (see case of *Broussard v. Bernard*, 7 La. 216,) and the Court of Probates is without jurisdiction to try the matters in litigation which may have arisen between the parties subsequent to its dissolution, and particularly those which may result from the defendant's responsibilities as a *negotiorum gestor*. The declinatory exception of the defendant must, therefore, prevail.

This question was not presented to our consideration when this case was last before us, as the crop of 1842 was not then in dispute ; the judgment of the court below, affirmed by us, had only provided for its being subsequently accounted for ; and the rendition of the account was simply reserved until the final liquidation. No opinion was pronounced upon such rendition ; and, therefore, the judgment cannot be said to have acquired the force of *res judicata* on this point.

On the merits of the controversy, we think that the judgment appealed from, except so far as it liquidates the rights of the parties to the crop of 1842, and provides for a subsequent settlement

of the crop of 1843, is correct, and should be maintained. It was the duty of the defendant to be present, with his counsel, at the trial of the cause. The record shows, that it had been repeatedly continued at his counsel's request; that it had been definitely fixed for trial; that he had agreed and promised to be ready on the first Monday in September; that the illness of one of his counsel was the cause of its being postponed until the 2d day of October; that on that day, none of his counsel appeared; that every time that the cause was called for trial, the plaintiff's counsel was ready to proceed; that every opportunity and convenience was afforded to the defendant to prepare his case; and that it was easy for the defendant to have produced on the day of the trial, all the vouchers and documents necessary for the liquidation of the proceeds of the crops in dispute. He had them in his possession when he moved the court for leave to file his account, and to rule the defendant to state, within three days, his objections thereto. He had no right to any such delay. He was not an administrator, or curator, whose account of administration was to be homologated; and as the Judge, *a quo*, very properly remarked in the bill of exceptions, it was the duty of the defendant to furnish evidence of the expenditures by him claimed, as they could not be allowed without proof.

We have carefully examined the evidence on which the judgment appealed from is based, and have attentively perused the voluminous records in which it is contained. They exhibit, on the part of the defendant, a determination to yield to his adversary nothing but what the latter may be strictly and legally entitled to; but we have been unable to discover in the judgment complained of, except with regard to the crops of 1842, and 1843, that any error has been committed to the prejudice of the appellant. The liquidation of the nett proceeds of the crops of 1840, and 1841, appears to be in accordance with the evidence. The appellant has been credited with large amounts of expenditures; the division in kind of the slaves and moveables has been legally ordered to be made, as also the sale of the several tracts of land described in the inventory; and, on the whole, we feel no hesitation in concluding, that justice has been done to the parties, with regard to all the matters in controversy settled and determined

in the judgment appealed from, which were within the jurisdiction of the Court of Probates.

It is, therefore, ordered, that the judgment first appealed from, so far as it homologates the report of the experts, and orders the difference of value of the property by them established to be divided between the parties, as being the value of the improvements belonging to the community, be annulled and reversed; that it be affirmed as to the rest; and that the case be remanded to the inferior tribunal for further proceedings in the adjustment of the rights of the parties to the said improvements, with instructions to the Judge, *a quo*, to conform to the rules and principles recognized in this, and in our former judgment.

And it is further ordered and decreed, that the judgment appealed from, as having been rendered on the 20th of November, 1843, be affirmed in all its parts, except so far as it liquidates the nett proceeds of the crop of 1842, and disposes of the crop of 1843; that the amount established by said judgment to be divided equally between the parties, be reduced to the sum of \$32,488 93, instead of \$42,756 12, reserving to the plaintiff his right of action against the defendant in the ordinary tribunals, for the recovery of what he may be entitled to out of the crops of 1842, and 1843, for the use of his property by said defendant as his *negotiorum gestor*; and that the costs of this appeal be paid by the plaintiff and appellee.

Robertson and *R. H. Chinn*, for the plaintiff.

Lobdell and *Labauve*, for the appellant.

WILLIAM BLAKE v. HIS CREDITORS.

Oppositions having been filed to the homologation of a *tableau* of distribution presented by the syndic of an insolvent, praying for the cancelling of the sales made by the syndic, that the property be disposed of again for the benefit of all the creditors, and the *tableau* set aside, the opponents subsequently filed other oppositions by way of amendment, in which, abandoning the objects of the first oppositions, and waiving their purpose of disturbing the sales and resisting the homologation of the *tableau*, they pray that the syndic may be condemned, personally, to pay them the amounts for which they were placed in the *tableau* as creditors of the insolvent, on

the ground of his having acted without any regular appointment, having sold the property illegally, and for his neglect and waste of the property: *Held*, that the demands in the original and amended oppositions are inconsistent, the one precluding the other, and cannot be cumulated in the same action, (C. P. 149); that the demands in the original oppositions must be considered as abandoned by the supplemental oppositions; and that any claim for damages against the syndic, personally, for malfeasance, should be brought against him individually, and not by way of opposition to a tableau of distribution.

APPEAL from the District Court of Iberville, *Deblieux, J.*

SIMON, J. On the 25th of May, 1824, William Blake made a surrender of his property to his creditors; and accordingly, a meeting of his creditors, after due notice given to them, was held on the 21st of August following, before the Judge of the parish of Iberville, when J. B. Rills being found to have obtained a majority of the votes of all the creditors present, was declared by the said Parish Judge, in his *procès verbal* of the deliberations, to have been duly appointed syndic. A copy of the said *procès verbal* having been filed and deposited with the Clerk of the District Court, an opposition was made to the homologation thereof, and to the appointment of the syndic, by Arnous and Pedron, two of the insolvent's creditors, on various grounds; which opposition does not appear to have ever been acted upon, or brought to the consideration of the court. At the October term, 1824, the insolvent's counsel having moved the court to have the Sheriff, Dupuy, appointed syndic to receive the property surrendered, it was objected to by Arnous and Pedron, who had filed an opposition to the first proceedings. The Sheriff was ordered by the court, *a qua*, to be appointed syndic; and to this Arnous and Pedron took a bill of exceptions. The judgment appointing the Sheriff as syndic, was duly notified to the opposing creditors, and the Sheriff subsequently gave bond with a good and solvent surety, in the sum of \$24,830, in favor of the insolvent's creditors, for the faithful discharge of his duties as syndic, &c. This bond was filed on the 10th of November, 1824.

On the 26th of November, the syndic made application to the District Court for the purpose of being authorized to sell the property surrendered for the benefit of the creditors, and an order was granted accordingly; but, in the mean time, several of the insolvent's mortgage creditors having presented their petitions to

have the mortgaged property sold for cash by the syndic, orders were granted by the Judge at chambers accordingly; whereupon the Sheriff, as syndic, on the 31st of December, 1824, proceeded to sell the property for cash, and the sale thereof having been legally advertised, the same was adjudicated by the Parish Judge, acting as public auctioneer, to the last and highest bidders, and without appraisalment.

On the 15th of April, 1825, and on the 27th of April, 1829, similar applications were made by two mortgage creditors, Louis Baugnon and François Néro, whereupon orders were granted at chambers, to sell the property mortgaged for cash, and without appraisalment. The mortgaged property was sold accordingly, at public auction, on the 25th of July, 1825, and 19th of October, 1829; and there remaining two lots of ground in the town of Plaquemines belonging to the insolvent's estate, to be disposed of, they were sold at public auction at the request of the syndic, on the 23d of August, 1830, after due advertisements, and without appraisalment.

On the 29th of April, 1831, the Sheriff, as syndic, filed a tableau of distribution of the funds proceeding from the several sales of the property surrendered, which tableau, after due notice given to the creditors, was opposed by Robert Bell and Joseph Orillion, creditors placed upon the *bilan* on several grounds, among others, that the Sheriff was illegally appointed by the court, *a qua*, syndic of the insolvent estate, Jean B. Rills having been previously appointed by the creditors, and there being no evidence in the record, of his refusal to accept, or of his resignation, and the court having no authority to appoint the Sheriff in his place; that it was the duty of the court to convene a new meeting of the creditors for the purpose of electing a new syndic; that the sales made by the syndic, are illegal and irregular, as they should have been made at one time, and not at four distinct periods, and the property sold according to the terms fixed by the creditors; that the sale of the property disposed of before the promulgation of the Civil Code, could not legally take place until the creditors had fixed the terms of the sale thereof; and that the sales made after the enactment of the Code, could not be made without appraisalment, as at a Sheriff's sale. The oppositions conclude by mak-

ing the mortgage creditors, on whose application the sales were made, and the purchasers of the property sold, parties to the suit; and by praying that the orders of sale, and the order appointing the Sheriff as syndic, and the several sales made by the Sheriff, may be declared null and void; that the property sold may be brought back to the mass to be disposed of for the benefit of the creditors; and that the tableau be not homologated, &c.

These oppositions were answered by the syndic, and all the other parties cited by the opponents, alleging that said oppositions had not been filed in due time; that all the proceedings complained of are regular, and were had agreeably to law; and by praying that the tableau of distribution may be homologated.

No action was had on the issues presented by the oppositions and the answers thereto, until October, 1840, when the opponents joined by Charles Clement, another creditor, filed their amended and supplemental oppositions, representing that the syndic, Dupuy, is indebted to them, respectively, in the several sums due them by the insolvent Blake, according to the statements contained in the first oppositions, on the grounds: 1st. that said Dupuy, not having been appointed syndic in a legal manner, is an intermeddler, or administrator *de son tort*; 2d. that he permitted the property surrendered to be sold without complying with the legal requisites; 3d. that the property was sold without appraisal, and without the consent of the creditors, or of the court; and, 4th. that he is liable for the liabilities and debts of the insolvent, for his neglect and waste of the surrendered property. Wherefore, they respectively pray, that said syndic be condemned to pay the sums due to them respectively, and that, *in homologating the tableau of distribution, the syndic may be ordered to place the opponents thereon, and to pay them the said sums, &c.*

These supplemental, or amendatory oppositions, were excepted to by the syndic's counsel, on the ground that they were independent original claims against him, for which he was personally responsible; but the objection having been overruled by the lower court, a bill of exceptions was taken, in which it is stated by the Judge, that his decision was given at the time of an application to fix for trial the oppositions to the tableau of distribution by the syndic, made by C. Clement, Joseph Orillion, and Robert Bell.

The exception filed by the syndic to these oppositions, was considered as not admissible in proceedings which are necessarily of a summary nature ; the court being of opinion, that if, on the trial, *any thing irrelevant or inadmissible was contained in these oppositions, such matters would then be rejected and disregarded.*

The record contains several other bills of exceptions, which have not been insisted on in the argument of this cause, or which, from the view we have taken of the questions presented, it is unnecessary to notice.

It appears from the state of the case, as shown by the record, that the opponents had the benefit of a trial upon the issues presented by all their oppositions, not only as against the tableau of distribution filed by the syndic, but also as against the syndic personally, and against all the other persons who had been made parties to the suit ; and that their pretensions, as growing out of the said oppositions, were submitted to a jury, who returned a verdict "in favor of the defendants," whereupon the inferior court rendered judgment in favor of the syndic and of his co-defendants on the several oppositions, overruled the latter, and ordered the tableau of distribution to be homologated and approved. From this judgment the three opponents have appealed.

The first question which presents itself to our consideration, grows out of the exceptions of the syndic to the filing of the supplemental oppositions, and the remarks made by the Judge, *a quo*, in the bill of exceptions. It appears therefrom, that he was not satisfied with the regularity or legality of the proceedings ; and that, although he overruled the syndic's exceptions, he was disposed to exclude and reject, or disregard any thing which would have subsequently proved to be irrelevant or inadmissible, as contained in the amendatory oppositions. As the record does not contain the charge of the court to the jury, we are totally uninformed as to what extent the opponents were permitted to urge their oppositions, or demands before the jury ; and, for aught that appears, we are induced to believe, that the trial was had upon both oppositions, since the verdict of the jury and judgment of the court, were in favor of the syndic and of the other defendants, although the latter had nothing to do with the supplemental oppositions, and particularly with the demand set up by Charles

Clement. We, therefore, find it necessary to inquire, not only into the right of the opponents to file their supplemental oppositions or demands, but also into the effect of the latter, with respect to those which were already on file, and by which the mortgage creditors, and the purchasers of the property, had been made parties to the suit.

The object of the first oppositions was clearly to obtain the cancelling of the sales made by the Sheriff, to bring the property back to the mass, to have it disposed of again for the benefit of all the creditors, and to set aside the tableau of distribution. The acts of the Sheriff, as syndic, were attacked by the opponents as mere nullities, and as not binding upon the creditors; and had these issues remained unamended, and been presented alone to the court and jury, the case would perhaps have offered very serious questions for their solution; if not as to the legality of the appointment of the Sheriff as syndic, which, not having been appealed from, had acquired the force of *res judicata*, at least with regard to the legality and validity of the proceedings subsequently had in disposing of the property surrendered.

But the opponents thought proper to change the nature of their first oppositions, and to seek another remedy, by rendering the syndic *personally liable*. Their amended oppositions were new demands, in which they were joined by Charles Clement, who had not filed any previous opposition, and the latter, together with the former opponents, concludes by praying that, *in homologating the tableau of distribution, the Sheriff be ordered to place them respectively thereon, and to pay them the amounts due them respectively*. The grounds on which they are founded are the same, and are so expressed as to show clearly that the opponents, abandoning their first object, have no further intention of disturbing the sales, and have no further objection to make to the homologation of the tableau, on which they wish to be placed for the amounts by them claimed, to be paid by the Sheriff personally. Neither of the oppositions contains any demand in the alternative; they are distinct and separate, and it is obvious that, as such, they cannot be cumulated in the same action. They are inconsistent, and, under the terms of article 149 of the Code of Practice, the one excludes the other.

Here, however, as we have already remarked, the case appears to have been tried upon both oppositions, notwithstanding the exceptions of the Sheriff, and the reservations made by the court in the bill of exceptions. This was clearly irregular; but as it was the duty of the opponents to point out the issues on which they intended to rely, had they thought fit to submit to the jury either of the demands presented by their pleadings, we are not prepared to say that they would have now the right of claiming that the cause should be remanded to be tried on either of their two distinct demands, the one of which necessarily precludes the other; particularly as, with regard to the claim set up for damages against the syndic personally, for malfeasance, suit should have been brought against him in his individual capacity, and not by way of opposition to a tableau of distribution. 6 Mart. N. S. 124. This is in accordance with the opinion of this court, pronounced in the case of *De L'Homme v. De Kerlegand*, 4 La. 360, in which it was held that "*the law having said that the one action precludes the other, it follows as a consequence that judgment could not be rendered on both; and, therefore, one or the other must be abandoned, before judgment could be pronounced.*" See also, 7 Mart. N. S. 400. In this case, the second demand had the effect of destroying the object of the first oppositions; it was inconsistent therewith, and once admitted to be filed, the opponents were perhaps precluded from prosecuting the former. But, however this may be, the irregularity cannot avail the appellants, who had the benefit of a trial upon both issues; and as, for aught we know, the jury may perhaps have considered the first demand as abandoned by the filing of the second, (a proposition which necessarily results from the nature of the latter,) and as no evidence of any importance has been adduced in support of the claim for damages, which, as we have just said, should have been the subject of a separate suit, and as no proof has been produced to establish that the opponents have in any manner been injured by the illegal proceedings, we are unable to discover any good reason why the verdict of the jury should be disturbed.

This conclusion renders it unnecessary to examine the legality of the proceedings had at the request of the mortgage creditors, or to inquire into the validity of the sales made by the Sheriff, in

Dugas v. Her Husband and others.

compliance with the orders obtained. It is clear, that the appellants could not pretend to recover both the property alleged to have been illegally sold by the Sheriff, and the payment, as damages, to be supported by said Sheriff personally, of the amounts respectively due them by the insolvent.

Judgment affirmed.

A. N. and R. N. Ogden, and Hiriart, for the syndic.

Edwards and T. G. Morgan, for the appellants.

STEPHANIE DUGAS v. JOSEPH ELIE DUGAS, Her Husband, and others.

A judgment for a separation of property between a husband and wife, is retroactive as far back as the day on which the petition was filed. C. C. 2406. The community of *acquêts* is dissolved from that time; and purchases made by the wife between the date of the demand and that of the judgment of separation, must be viewed as made on her own account.

The acquired rights of a party to the proceeds of a sale made under an execution in his favor, cannot be affected by subsequent acts, or proceedings, to which he was not a party.

APPEAL from the District Court of Assumption, *Nicholls, J.*

No counsel appeared for the appellant.

J. C. Beatty, for the appellees.

MORPHY, J. Sundry executions having issued against Joseph E. Dugas, at the suit of Turner & Woodruff, Elbridge Whitman, Hyde & Goodrich, and Alexander Kirkman & Co., judgment creditors, Stephanie Dugas, his wife, brought this action for a separation of property, claiming for moveable effects brought by her in marriage, and for money since received by her husband from the succession of her father, Jacques Verret, the sum of \$2148 42, with privilege and mortgage on the property seized; and she en-joined in the hands of the Sheriff, the proceeds of the sales about to be made by that officer, under the executions. The judgment creditors answered, denying that the petitioner had any such mortgage as that claimed by her, or that she had received from her father's succession the sum of money set forth in her petition.

Dugas v. Her Husband, and others.

They further averred, that the Sheriff's sales, the proceeds of which had been enjoined, amounted to, \$4144; that, through error, the Sheriff left in the hands of the purchaser of a tract of land levied upon, the sum of \$3600 the amount of certain mortgages supposed to exist on it, while in reality there is no other special mortgage on the land than one for \$600, in favor of the Union Bank of Louisiana; and that the plaintiff in the injunction, who purchased all the property seized, is bound to pay the surplus of her bid over this sum, to wit, \$3544, into the hands of the Sheriff, to be distributed according to law. They pray for judgment in reconvention accordingly, and for damages at the rate of twenty per cent.

The case was submitted to a jury, according to whose verdict there was a judgment below, ordering that the plaintiff be separated in property from her husband, Joseph E. Dugas; that she be paid, by preference, out of the price of the tract of land enjoined in the hands of the Sheriff, the sum of \$1100; and that she be permitted to retain and keep the sum of \$660, to meet the special mortgage of the Union Bank. It was further ordered, that the injunction, as to the price of the moveables, should be dissolved, and that the Sheriff should pay its amount, to wit, \$543, to the seizing creditors; and it was finally ordered, that Stephanie Dugas should pay over to the Sheriff, out of the price of the land adjudicated to her, the sum of \$1840; and that, in the event of her failing to pay the surplus of the price of the land, above the amount she is authorized to retain for her own claim and the mortgage of the Union Bank, an execution should be issued forthwith, commanding the Sheriff to seize the said tract of land, and to sell the same, to satisfy the aforesaid balance due by her. From this judgment, the plaintiff has taken a devolutive appeal.

As no points have been filed in this case, and it has not been orally argued on the part of the appellant, we are somewhat at a loss to know on what grounds the judgment is supposed to be erroneous, and what relief is expected at our hands. The evidence, which we have attentively examined, does not, in our opinion, entitle the plaintiff to a larger sum than that which the jury have allowed her. In searching the record, we have found, that more than twelve months after the land of the defendant had been adju-

Dugas v. Her Husband and others.

dedicated to the plaintiff for \$3000, and his moveable property for \$543, both the land and the moveables were levied upon at the suit of A. F. Dunbar & Co., other judgment creditors of the defendant, and that a part of the moveables was sold for \$223 87, to sundry persons. As evidence of this fact was given below, we suppose that it forms the subject of the appellant's complaint; but she has only herself to blame, if any of the moveables adjudicated to her were taken away from her and sold. They had become her property, and she had given to the Sheriff her bond, with security, for the amount of the adjudication. It is true, that at the time of the purchase this suit was pending, and no judgment of separation had been rendered; but, under article 2406 of the Civil Code, the judgment which pronounces the separation of property is retroactive in its effect, as far back as the day on which the petition praying for the same was filed. The community of *acquêts* must, therefore, be considered as having been dissolved from that day; and all purchases made by the wife, in the intermediate time between the demand and the judgment of separation, must be viewed as made for her own account, and not for the community, which she had declared her wish to put an end to. 13 Toullier, Nos. 97, 99, 105. Pothier, *Traité de la Communauté*, No. 510. The plaintiff should, therefore, have protected these moveables from the illegal seizure of other creditors of her husband. If she has failed to do so, the acquired right of the defendants in injunction, to the proceeds of the sale made under their executions, has not been affected by subsequent acts or proceedings to which they were not parties; and the plaintiff is liable for the whole amount of her bond in the hands of the Sheriff.

Judgment affirmed.

FÉLICITÉ VERDUN v. ALEXANDER R. SPLANE.

A mother, a slave, having been emancipated, her infant child, about eight months old, was suffered to remain with her until the death of her former owner, when the child was sold with the other property of the deceased. The child was then about twelve or thirteen years old. *Held*, that the circumstance of the child's being left with its mother at so tender an age, cannot be considered as evidence of an intention to permit the enjoyment of liberty, within the meaning of art. 3510 of the Civil Code; and that the prescription of ten years established by that article is not applicable to such a case.

APPEAL from the District Court of Terrebonne, *Deblieux, J. Thibodeaux and Cole*, for the plaintiff.

J. C. Beatty, for the appellant. Till the age of ten, the master was compelled to leave the infant with its mother. B. & C.'s Dig. 49. Art. 3510 of the Civil Code is inapplicable here, the child not being in the enjoyment of its freedom. *Hart v. Foley*, 1 Robinson, 378.

MARTIN, J. The defendant is appellant from a judgment, which declares Simeon, the son of the plaintiff, an emancipated woman of color, to be free. The record shows that Simeon was born before the emancipation of his mother; but it is contended that he has acquired his freedom by prescription; and this is the only question which this case presents for our solution.

The record shows that Simeon was born on the 10th August, 1827, and at the inception of the present suit, (24th of September, 1842,) was barely 15 years of age; the plaintiff, his mother, having been emancipated on the 3d of April, 1828, about eight months after his birth. This age is taken from the baptismal register; but as he was not baptized until about a year after his birth, witnesses were examined with regard to his age; but their testimony does not diminish the evidence resulting from the priest's certificate. His mother, being free, was permitted to raise him during the life of her former owner, on whose death, Simeon was sold with the other slaves of the estate, and purchased by his mother, the present plaintiff; he then being about 12 or 13 years of age. Several witnesses have sworn that Simeon was always considered as a free boy; and it has been urged that his owner lost every

right to claim him as a slave, because he suffered him to enjoy his liberty for ten years. Civil Code, art. 3510. His mother, having been emancipated when he was about eight months old, his being left with her to be suckled and raised, cannot be offered as evidence of the master's suffering him to enjoy his liberty. She had been a meritorious slave, and had been rewarded by her emancipation. It would have been cruel, and absolutely inconsistent with the feelings which induced the master to emancipate her, to deprive her of the gratification of raising a child of so tender an age; and his conduct must be viewed as a proper indulgence, rather than as evincing any intention of suffering the child to enjoy his liberty. Indeed, at so tender an age, he could enjoy no liberty. The mother and present plaintiff, did not consider him as a free person at the death of her former master; for she did not oppose his being dealt with, and inventoried, as the other slaves of the estate, but actually purchased him, and gave notes, with the required security, for the price.

We are of opinion, that the circumstance of the child being permitted by the deceased to remain with his mother, an emancipated slave of his, was improperly considered as evidence of a sufferance of the enjoyment of his liberty, so as to destroy the right of the heirs to claim him as a slave.

The plaintiff has claimed in reconvention, and in deduction from her notes, an allowance for raising the child from the date of her emancipation until the day of sale. It appears to us, that during the latter part of the time, the expenses of his support were more than compensated by the services he was capable of rendering; and that during the first part, as nothing shows that she considered him as free, and as she never applied for any compensation, she either received one, or thought she was not entitled to any.

It is, therefore, ordered, that the judgment be annulled and reversed, and that the injunction issued in this case be dissolved, with costs in both courts.

Dumont v. The Roman Catholic Church of Ascension.

CLAUDOT DUMONT v. THE ROMAN CATHOLIC CHURCH OF
ASCENSION.

An undertaker, having contracted with defendants to erect a building for them, employed plaintiff to furnish the materials for the roof, and to construct it. By a resolution, the defendants subsequently stipulated with the undertaker, that they should retain the cost of the roof out of the amount due to the undertaker, to be paid to plaintiff on the order of the undertaker. It was proved that defendant's retained, at the date of the resolution, a sum sufficient to pay for the roof, and that it was not paid out in conformity to their stipulation, on the order of the undertaker. In an action by plaintiff for the cost of the roof: *Held*, that any payments made without the order of the undertaker, were irregular, and cannot prejudice plaintiff's right to recover. C. C. 2744. Judgment against defendants for the cost of the roof.

APPEAL from the District Court of Ascension, *Nicholls, J.*

C. A. Johnson, for the appellant.

Ilseley, Nicholls, Duffel and Bodin, for the defendants.

BULLARD, J. The defendants having contracted with one Voilquin, to construct them a church, the latter employed the plaintiff to put on the roof, and furnish the materials, for \$1650, which it was first agreed should be slate, but was afterwards changed to zinc, with the consent of the defendants. The plaintiff having performed the job, obtained the certificate of the architect, and his order on the Church Wardens, for the price agreed on; but payment was refused, and the present action brought.

The defendants admit, that they did contract with Voilquin for the construction of a church, and that the contract was so modified afterwards, as to permit him to substitute zinc for slate, in the construction of the roof; but they deny that they ever contracted, either directly or indirectly, with the plaintiff; and they aver, that he has no claim on them, they having long since paid, or assumed to pay, on account of materials furnished for, and labor done upon said church, under their contract with Voilquin, more than they were bound to pay. They further aver, that if they are in any manner bound to the plaintiff for the work, or any part of it, which, however, they deny, the work was unskillfully done; that they never accepted the roof, and that the plaintiff is

liable in damages, which, to the amount of \$5000, they plead in reconvention and compensation.

There was a verdict against the plaintiff, as to his demand ; and, in his favor, upon the reconventional demand of the defendants, which being followed by a judgment, the plaintiff appealed, after a vain attempt to obtain a new trial.

According to the first contract with Voilquin, as evidenced by a resolution of the Board of Church Wardens, a written contract, he was to receive \$19,000 for the construction of the church, payable monthly, from and after the 1st of April, 1840, at the rate of \$1000 per month, and was to show the employment of the money as fast as paid. This agreement was afterwards modified by a resolution of the Church Wardens, in September, 1841. They made a further allowance to the undertaker, of \$500 ; and resolved, that the amount then due him should be retained by the Church Wardens, and paid to the workmen employed "*pour le couverture de l'église,*" on the order (mandat) of Voilquin, as the work shall have been done, to the amount that shall remain due. Voilquin, by the new agreement, was to receive \$100 a month, as superintendent. In June, 1841, an additional sum of \$2000 had been allowed to the undertaker.

The plaintiff having completed the roof according to contract, about the middle of December, 1841, obtained the certificate of the architect to that effect, and his written order on the Wardens, for the amount agreed upon.

Two things appear to us very satisfactorily shown, to wit: *first*, that there was a sufficient fund retained by the defendants to pay for the roof at the date of the resolution ; and, *secondly*, that the whole was not paid out in conformity to their contract, on the order of the undertaker. Any payments made without such order were irregular, and calculated to disappoint the just expectations of the plaintiff, who had a right to count upon the promise of the defendants. Such payments were, in substance, anticipated payments, and cannot be permitted to prejudice the plaintiff's right. The verdict has negatived the averment that the roof was unskilfully made. The case is analogous to that

Millaudon v. Martin.

of *Girarthy v. Campbell*, ante, p. 378. Civil Code, art. 27, 44. 14 La. 44.

The judgment of the District Court is, therefore, reversed, and it is ordered and decreed, that the plaintiff recover of the defendants, sixteen hundred and fifty dollars, with interest at five per cent from judicial demand, and costs in both courts.

LAURENT MILLAUDON v. PETER MARTIN.

The master of a merchant vessel or steamer, is an officer, within the meaning of art. 3499 of the Civil Code, and the action for his wages is prescribed by one year. The steam tow-boats, plying on the Mississippi, between New Orleans and the Gulf of Mexico, are vessels performing voyages, like other vessels or steamers.

APPEAL from the Commercial Court of New Orleans, *Watts*, J. This was an action for the balance of an unsettled account, instituted on the 6th May, 1840. The first item in the account was dated 14th August, 1836; and the last, the 26th January, 1838. The defendant answered, on the 27th May, 1841, by a general denial, and by averring, in reconvention, that plaintiff was indebted to him in the sum of \$6000, for services rendered by him as master of the steam tow-boat, *Pacific*, from 1st May, 1836, to 1st May, 1839, at the rate of \$2000 a year; the boat belonging to plaintiff, and being employed as a tow-boat on the Mississippi, between New Orleans and the Gulf of Mexico. The plaintiff discontinued his demand, and pleaded the prescription of one year to the reconventional claim set up by defendant. The allegations of the latter as to the ownership of the steamer, and the value of the services rendered by him, were proved; but the court below, considering the reconventional demand as a distinct and independent claim, sustained the plea of prescription. The defendant appealed.

Benjamin, for the plaintiff.

Eustis, for the appellant. The court below erred in sustaining the plea of prescription. Art. 3499 of the Civil Code, which declares, that "the wages of the officers, sailors and others of the crew," are prescribed by one year, does not apply to the defen-

dant, who was captain. *Ex vi terminorum*, it is apparent that this prescription only applies to such officers and sailors as form a part of the crew; but the term crew in common parlance excludes the captain, as we say, "the captain and crew." The captain before he begins a voyage must provide the vessel with a suitable and efficient crew. So the act of Congress, 20th July, 1790, sect. 3, provides, that if the mate and a majority of the crew, discover that a vessel is leaky, they may bring her back having applied to the master, &c. The words used in this act prove conclusively, that by the word *crew*, is meant all sailors and officers of the vessel, except the captain. Articles 3204, § 11, and 3500 of the Civil Code, prove this also. An examination of the provisions of the Civil Code shows, that when the captain is spoken of, he is mentioned, *eo nomine*. Art. 3204, § 6, 7, 11. Art. 3213. He cannot, therefore, be presumed to be included under the general term, officers. The class of cases to which the prescription of one year applies, forbids the conclusion that the master of the vessel, who is an officer of high confidence, and the agent of the owners, is embraced by it. Vide, Abbott on Shipping, 161, 163, 458 et seq. 3 Kent's Com. 121, &c.

But considering the cause in another aspect, and admitting, for the sake of argument, that the word *officer* includes the captain, still the 3499th art. has no application to the defendant—the plaintiff in reconvention. 1st. Because the following art. (3500) declares, that "with respect to the wages of officers, sailors, and others of the crew of a ship, the prescription runs only from the day when the voyage is completed." But the defendant was the master of a *tow-boat*, employed in plying between the Balize and New Orleans, which performed only trips, and not *voyages*. Indeed, tow-boats are but a *species of ferries*, and never undertake *voyages*, since a voyage "is the passage of a ship upon the sea from one port to another," (vide Bouvier's Law Dict. vol. 2, p. 481, *verbo*, Voyage,) for which tow-boats, by their construction and destination, are wholly unfit. But if this be a mistake, ought not Millaudon to have shown when the voyage ended; and does not his failure to do so, prevent him from availing himself of the legal exception on which he relies? 2d. The term *wages*, employed in both these articles of the Civil Code, is usually applied

to compensation paid weekly, or monthly, and *salary* to annual compensations. At least, it is so used in the Civil Code, which speaks of salaries of overseers, clerks, secretaries, &c., (art. 3503;) and this consideration also prevents the applicability of art. 3499 to the defendant, who has proved that his annual salary was \$2000. 3d. There is another and paramount consideration establishing the same principle, which is; that tow-boats were not known at the time the Civil Code was enacted, and, therefore, the legislation contained in it, can have no possible reference to them. 13 La. 525.

But even if the plea of prescription was applicable, the plaintiff could not avail himself of it in this particular case, because of the provision of the 3486th art. of the Civil Code, which declares, that an *acknowledgment* of the debt intercepts prescription. In *Whetmore v. Smith*, 2 Root's Conn. Rep. 1; 1 N. H. Rep. 19; *Cogswell v. Dolliver*, 2 Mass. Rep. 217; *Bunting v. Lagow*, 1 Blackford's Ind. Rep. 373, it is decided, that the existence of unsettled accounts between the parties, as in the present case, is equivalent to an acknowledgment, and suspends prescription. In the absence of any positive explanation in our own Code, of the meaning of the term *acknowledgment*, that, received in our sister States, in *pari materia*, will no doubt be deemed sufficient. See also, *Tucker v. Ives*, 6 Cowen's Rep. 193. *Chamberlain v. Taylor*, 9 Wendell's Rep. 126.

Schmidt, on the same side. The provisions of the 3499th art. of the Civil Code, are borrowed literally from the 433d art. of the Code de Commerce of France. The terms used by the French Code are, "gages et loyers des officiers, matelots et autres gens de l'équipage."

Boulay Paty, in his *Droit Commercial Maritime*, vol. 2d, p. 278, Brussels edition, 1838, says, that the sense of the article is clear, and, that it is evident that it applies only to *gens de l'équipage*.

It is, consequently, only necessary to ascertain the meaning of the term, in order to be convinced that it does not include the captain. Fortunately, Pardessus has explained the term with such precision as to leave no room for doubt or controversy. His language is: "Le service d'un navire est fait, sous la direction

du capitaine par un grand nombre de personnes qui portent diverses qualifications."

"Toutes ces personnes, et le capitaine lui-même considéré comme locateur de ses services, sont compris sous la dénomination collective de *gens de mer*. Lorsqu'on veut distinguer le capitaine, et qu'il est en opposition avec ceux qui lui sont subordonnés, ces derniers prennent le nom de *gens de l'équipage*." Pardessus adds : *Il est important de ne pas perdre de vue cette distinction nécessaire dans un grand nombre de circonstances.* Pardessus, Droit Commercial, vol. 3, p. 110, tit. 3, No. 667, Paris edition, 1831.

If Pardessus be right, which can hardly be questioned, then it is obvious that the captain, so far from being included under the provisions of the article, is necessarily excluded by the use of the words *gens de l'équipage*, which are always used in opposition to him, and include all others belonging to the vessel than the captain. So in English, the captain, though a *mariner*, (*gens de mer*,) is not one of the *crew*, (*gens de l'équipage*,) because the word "*crew*," is only applied to the officers, sailors, &c., who are under the captain's orders.

Payment is one of the causes which interrupt prescription. In the present suit, Millaudon's account shows various payments. Vid. Troplong on Prescription ; Vazeille on Prescription, as well as the Civil Code of this State, under the title of Interruption of Prescription.

GARLAND, J.* The plaintiff claims the sum of \$1798 50, the balance of an account current between him and the defendant. The items in the account filed are, the balance of a former account rendered, and various charges of *cash paid* to the defendant, at different dates. The latter answers by a denial of any indebtedness to the plaintiff, but sets up a claim in reconvention against him for \$6000, for services rendered as master of the steam tow-boat Pacific, which belonged to the plaintiff, for three years previous to May 1st, 1839, at the rate of \$2000 per annum ; for

* BULLARD, J, was not present on the argument of this case, and, consequently, took no part in the decision.

which he prays for judgment. When the cause was called for trial, the plaintiff offered no evidence to sustain his demand, but discontinued it, and at the same time pleaded the prescription of one year to the demand in reconvention. The defendant offered evidence to prove, that for about three years previous to May 1st, 1839, he was master of the steam tow-boat Pacific, belonging to the plaintiff, which was engaged in towing vessels from New Orleans to the Balize, and to sea, and back again, for hire. He proved that his services were worth \$2000 per annum; and it is shown that the plaintiff sold the boat, about the 1st May, 1839. The demand in reconvention was presented and filed May 27th, 1841, more than one year after the suit was commenced on the account, and more than two years after the defendant had left the service of the plaintiff. On the plea of prescription, the court below gave a judgment against the defendant on his demand in reconvention, and he has appealed.

The plaintiff, to sustain his plea of prescription, relies upon article 3499 of the Civil Code, which provides, that the action "for the payment of the freight of ships and other vessels, the wages of the officers, sailors, and others of the crew," shall be prescribed by one year. Upon this provision, apparently so clear, the counsel for the defendant have based a long and ingenious argument, to prove that the master or captain of a ship or steamboat is not an officer within its meaning, and that his wages are only prescribed by ten years. They tell us, that among nautical men, the master of a merchant ship is not considered or called an officer, and that he does not form a part of the crew. Upon this subject, the record gives no information; but as our Code was framed by legal men, we are to presume they looked to legal works for definitions, and the meaning of particular words.—Bouvier, in his Law Dictionary, vol. 2, p. 105, gives a definition of the term "master of a ship," viz., "the commander or first officer of a ship, a captain, &c." The definition given by Professor Wilson of the words *maitre de navire*, is master, captain, or commander of a ship. Vide Wilson's French and English Dictionary—verbo *Maitre*. The *Lex Mercatoria Americana*, p. 131, says, the master of a ship is he to whom is committed the government, care, and direction of the vessel and cargo. In their nomination, the

amount of interest, not numbers, predominates; "but when constituted, they, like all other officers of the public," are accountable, &c. The mate of a merchant ship is called "the first officer under the master," p. 181. Curtis, in his *Treatise on the Rights and Duties of Merchant Seamen*, 161, says, "the master of a merchant vessel is that officer to whom is intrusted the entire command of the ship," &c., appointed by the owners, and he stands towards them in a different light than towards third persons. Chancellor Kent says, "the captain of a ship is an officer to whom great power, momentous interests, and large discretion, are necessarily confided," &c. Notwithstanding these definitions, the counsel insists, that our Code, and the acts of Congress, do not consider the master or captain of a merchant ship as an officer. They first refer us to article 3204, Nos. 6, 7, 11. It will be remembered that this article is one which states what privileges are allowed upon ships and merchandize. The first clause gives a privilege to the captain for his wages; and it was probably thought necessary to name him, as the commercial law, from motives of policy, did not give such a right. The second clause gives a privilege for money lent to the captain, to purchase necessaries for the vessel. It was necessary to name the captain, for the purpose of designating the officer to whom the money must be lent, to entitle the lender to a privilege. We see nothing in the 11th clause which can be viewed as declaring that the captain is not an officer of the ship, or calculated to raise such a presumption. It is the clause that gives the owners of goods, or merchandize, a privilege for damage sustained through the fault of the captain or crew. Article 3213 gives the captain a lien for the freight on the merchandize he transports in his ship, without which he would have lost a right accorded by the commercial law; but does that prove that he is not an officer? The right is given, not because the captain is not an officer, but because he is the commanding officer. The mate would have the same right, if, by the death of the master at sea, or any other such cause, he should become the commander of the vessel. The name of captain implies an office, and conveys the idea of an officer, in the general understanding of the term. We have been referred to the act of Congress of 3d March, 1835, § 3, to prove that the master is not an officer. It

commences by declaring, that "if any master or other officer of any American ship or vessel on the high seas," shall maliciously beat or imprison the crew, &c., he shall be punished, &c. These words, *master or other officer*, the counsel tells us, prove that the master is no officer, and was not so considered by Congress. To sustain this assertion, we are referred to another act of July 20th 1790, § 3, which provides, "that if the mate, or first officer under the master, and a majority of the crew of any ship or vessel," &c. Now, will not the words, "mate, or first officer under the master," as conclusively prove that the mate is not an officer, as the words "master, or other officer," prove that the master is not an officer? It appears to us they do.

The counsel further rely upon a decision in 3 Sumner's Rep. 209, to support their view of the case. This was a prosecution under the act of Congress of 1835, against the master of a ship, for beating and confining the mate; and the question was, whether the mate, who was called the chief officer of the ship, made a part of the crew. Judges Story and Davis held, that he did form a part of the crew; and the opinion as clearly proves, that the master, too, is often included as a portion of the crew. In the piracy act of 1819, chap. 200, the public ships of the United States are directed to protect merchant vessels, and their *crews*, from piratical aggression, &c. This expression, as clearly includes the master and officers, as it does the sailors. So, in the piracy act of 1820, it is said, if any person, being of the crew or ship's company, of any piratical vessel, shall land, &c., they shall be punished, &c. There cannot be a doubt, we suppose, that these words would include the piratical captain, if he were taken and prosecuted. In common parlance, we often hear it said, that "the vessel was lost, but that the crew was saved;" would any one infer from this, that the master was drowned, because, in technical language, he formed no part of the crew, and was not an officer?

The counsel, in relying upon the French authorities, seem to forget, that it is a matter of regulation in France, under the Code of Commerce, and various ordinances, which keep up a distinction between the master and his subordinates. There are different grades of commanders. The captain, the master, and patron;

depending on the size of the vessels they command, and the voyages they make, whether foreign, or coastwise.

We have no doubt, that the master of a merchant ship or steamboat is an officer within the meaning of article 3499 of the Code, and that the action for his wages is prescribed by the lapse of one year.

We do not think, that because the defendant chooses to call his compensation a salary instead of wages, that it changes the law in relation to prescription.

The argument that steam tow-boats are not vessels performing voyages, as other vessels or steamboats, was met and decided in the case of *Davis v. Houren et al.*, ante, p. 255.

We are further of opinion, that the defendant does not come within the exception of article 3500 of the Code, which declares, that the prescription does not run where there is a note given, or account acknowledged. There was no note, or account acknowledged in this case. On the contrary, the account of the plaintiff is denied in the answer. The last item in that account is dated the 26th of January, 1838, more than three years before the defendant set up his demand. It is not alleged, nor proved, that the sums which the plaintiff charges as having been paid to the defendant, were on account of his demand for services as master of the boat, nor can they be so supposed. The plaintiff has not proved they were paid at all, and as the defendant denies it, we take it to be true that they were not. But admitting they were so paid, the defendant cannot benefit by it, as more than three years have elapsed between the last payment and the presentation of his demand.

*Judgment affirmed.**

**Schmidt*, for a re-hearing. The counsel of the appellant never contended, nor meant to contend, that the captain was not an officer of the ship, in the usual acceptance of the word officer. This, on the contrary, was distinctly admitted, and they traced the etymology of the word, from which it is evident that the captain, having important duties assigned to him, was unquestionably an officer, nay, the commanding officer of a vessel. If the controversy, therefore, had depended solely on the solution of the question, whether the

captain is an officer in the usual sense of that word, as the court seem to suppose, no difference of opinion could possibly have arisen, and the counsel of the appellant would have abstained, both out of respect for the court, and for themselves, from urging any argument on a question so clear as to be almost self-evident.

The doctrine of the appellant's counsel was this ; that the captain, although an officer, was not one of the officers spoken of in the 3499th art. of the Civil Code, which provides, that the *wages of the officers, sailors and others of the crew*, are prescribed by one year.

The grammatical construction of the sentence shows, that the word *crew* controls the whole, and the provision is equivalent to the declaration, that all the officers, sailors, and others comprising the *crew of a vessel*, must claim their wages within one year after the termination of the voyage. The appellant contends that the captain of a vessel is not included in this provision. The Civil Code, when it intends that a law shall apply to the master, invariably uses the word *captain*. *Vid.* Civil Code, art. 3204, nos. 6, 7, 11 ; art. 3213, &c. The provisions of the 3499th article, were intended more especially for the protection of the captain, who hires the crew and all the officers, and who is personally liable for the payment of their wages, and who, in almost every case, pays such wages. It would be a strange anomaly to apply to the captain, and make him the victim of, a law, which, beyond all doubt, was made to protect him against the demands of those he had employed, after a certain lapse of time, and particularly in foreign ports, where he would, most probably, not be prepared with the evidence requisite for his defence.

The provisions of the 3499th article, are a literal transcript of the 433d article of the Code de Commerce of France, and the expressions on the French side of the Civil Code of this State, are copied, *verbatim*, from the last named article.

A general rule of construction, requires us to look to the motives and intentions of the legislature, whenever it becomes necessary to interpret the meaning of a legal enactment. So, when one country re-enacts a law already existing in another, the natural and the only legitimate presumption is, that the law thus adopted was intended to have the effect in the new country, which it had in the country from whose legislation it was borrowed ; and this inference becomes irresistible, when, on a comparison of the laws, you find, as in the present instance, that the language is identical.

But if this be true, the observations of the court, that "*the counsel, in relying upon the French authorities, seem to forget that it is a matter of regulation in France, under the Code of Commerce,*" &c. are inexplicable.

It is evident, that the counsel have not forgotten the regulations of the French Code of Commerce, since, in both their oral and written arguments, its provisions are cited ; and the doctrine which they have urged upon the court, is, that the regulations of the Civil Code of this State, being copied from, and identical with those of the French Commercial Code, regard should

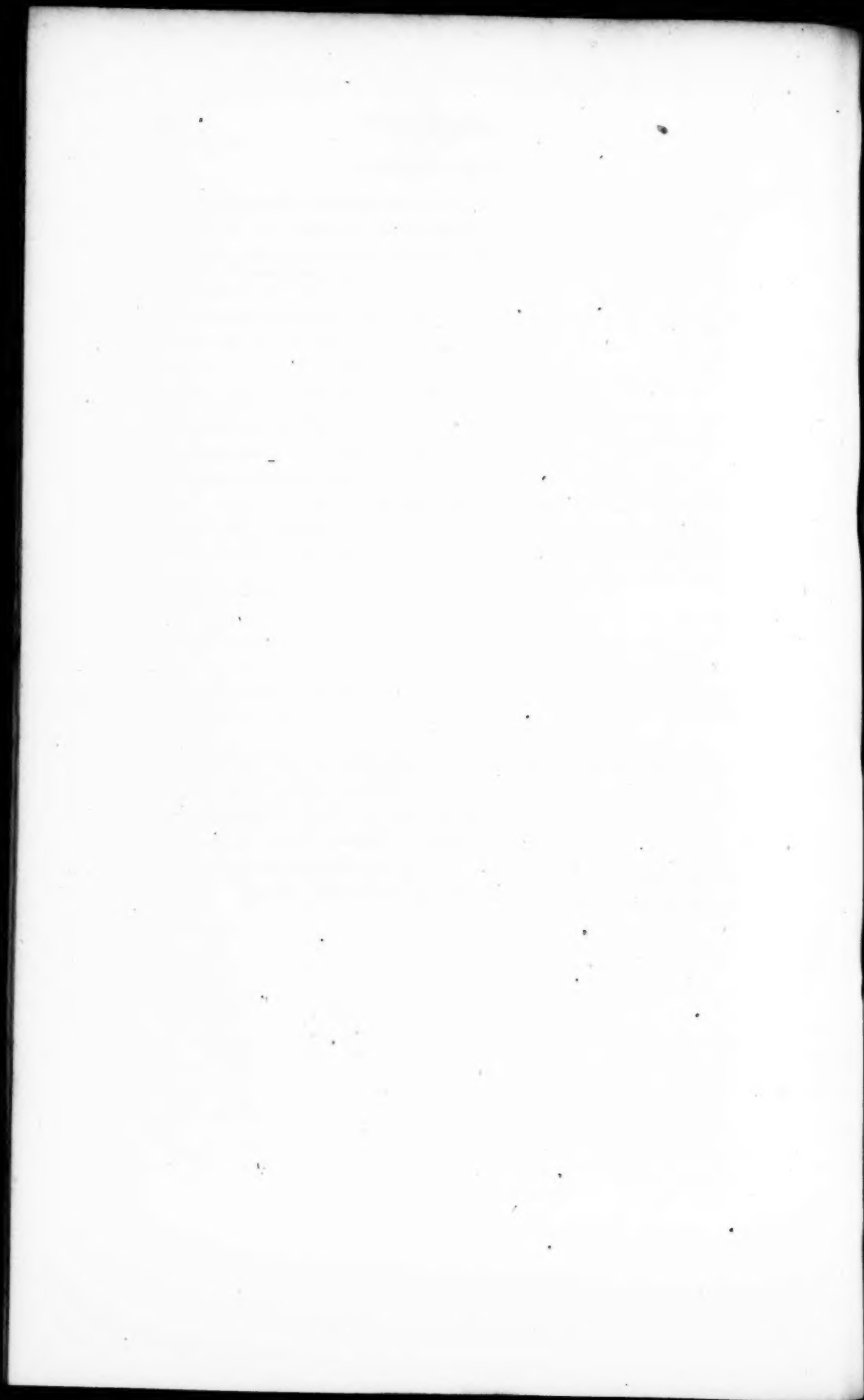
Stainbach v. Sharkey, &c.

be had to the latter in the interpretation of the former. The counsel of the appellant have also shown, that Pardessus, Droit Commercial, Vol. 3, p. 110, no. 667, says: "*Lorsqu'on veut distinguer le capitaine, et qu'il est en opposition avec ceux qui lui sont subordonnés, ces derniers prennent le nom de gens de l'équipage.*" Now the term *gens de l'équipage*, is the identical expression used in the 3490th article of the Civil Code of this State; and as it is only used in opposition to the captain, and to designate the persons under his command, the provision is inapplicable to him.

In addition to this, it should be taken into consideration, that steam tow-boats were not in existence when the law was made; that the masters of these vessels are salaried officers, employed by the year, which is not the case with masters of merchant vessels; that, in order to make the article of the Code affect them, it is necessary, first to show that it was applicable to captains of merchant vessels performing voyages, and then by analogy to apply it to masters of tow-boats; and that too, in a matter of *prescription*, which is never, in any case, extended by analogy so as to include cases not provided for by the strict letter of the law.

Re-hearing refused.

In the cases of *Littleberry E. Stainbach v. John Sharkey*, and *Caleb S. Benedict and others v. Edward Stow*, from the Commercial Court of New Orleans; and of *Paul Langlais v. Henry T. Williams*, and another, from the District Court of Ascension, the judgments of the lower courts were affirmed, on appeal, in New Orleans, during the period embraced by this volume.



INDEX.

ABSENTEE.

1. Every law empowering our courts to decide upon the rights of absentees must be strictly construed, and the formalities prescribed exactly followed.
Hill v. Barlow, 142.
2. A mortgage in favor of an absentee, executed and registered by the mortgagor, has its legal effect though not accepted by the mortgagee. Ib.

See CURATOR AD HOC.

ACCESSION.

1. A possessor in good faith, under a title which he honestly believes to be just in point of fact and form, is entitled to his improvements, and is not bound to account for the fruits and revenues, until the property is claimed by the real owner. The possession and title must be such as to entitle the party to the prescription of ten years. The possessor in good faith is one who has just reason to believe himself the master of the thing which he possesses, though he may not be so in fact, (C. C. 3414;) the possessor in bad faith, one who knows that he has no title, or that his title is defective. Ib. 3415. Lowry v. Erwin, 192.
2. A judgment by a court having no jurisdiction or authority to render it, is null and void; and one possessing under it, is not a possessor under a just title and in good faith, so as to exempt him from liability for the fruits and revenues, until claimed by the owner. To exempt him, as a possessor in good faith, from such liability, the possession must have been valid in point of form. C. C. 3452. Ib.
3. A possessor without a just title, owes the fruits and revenues from the commencement of his possession. Ib.
4. A purchaser who receives the rents of the property purchased, and subsequently declines to complete the contract on the ground that the vendor

could not make an unincumbered title, is bound to refund the rents so received. *Nash v. Parker*, 324.

5. On the sale of land, it was stipulated that the price should be paid in instalments at future periods, but the act was silent as to interest. In an action for the price, with interest from the day of sale: *Held*, that the property producing fruits, the vendor is entitled to interest, but only from the maturity of the instalments. C. C. 2531. *Daigle v. Bruzzé*, 418.
6. The purchaser of a slave, sold under a *fi. fa.* against a party in possession not shown to have been aware of the defects in the title of the latter, being a possessor in good faith, will be responsible to the owner for the value of his services, only from judicial demand. C. C. 495, 3416.

Haydel v. Betts, 438.

7. A possessor of a plantation and slaves, responsible to the owner for the fruits and revenues, will be bound to account for such a crop as he might have made therefrom, with ordinary good management. The actual production of the plantation, which was proved to have been neglected, is not a just measure of the damages due to the owner. *Winter v. Zacharie*, 466.

See PLEADING, 13.

AGENCY.

1. Payment of part of a note as agent for the defendant, by one who had drawn it in that capacity, is not evidence of his authority to bind the defendant as drawer of the note. He may have been acting as a general agent, with powers of administration only; the power to draw or endorse a note, or bill, must be express and special. C. C. 2966. *Notrebe v. M'Kinney*, 13.
2. A power constituting one a "special and general agent and attorney in fact, delegating to him both general and special powers to manage all the business of the constituent, and more especially to draw notes and drafts, and to endorse those made by himself or others," does not authorize the agent to bind his principal as surety, *in solido*, with himself, in a contract relating exclusively to his own interests. *Copley v. Flint*, 56.
3. After the dissolution of a partnership, no one of the partners can use the social name so as to bind the others. Any authority to do so must be derived from a new contract between the parties, and such a contract is essentially one of mandate. To draw or endorse any bill, or note, in the name of the former partnership, the authority must be express and special. C. C. art. 2966. *Rudy v. Harding*, 70.
4. A principal cannot plead ignorance of the acts of his agent.

Wolf v. Rogers 97.

5. A master of a steamer has no authority to bind the owners farther than for the necessary expenses of the boat. *Lambeth v. Vawter*, 127.
6. Where things to be done are not merely acts of administration, or such as facilitate such acts, the power must be express and special. C. C. 2966.

Hill v. Barlow, 142.

7. The exercise of the right of claiming prescription is an act of ownership ; and its abandonment is one of alienation, which no agent can do, so as to deprive his principal of his right to claim it, without special authority from the latter. *Ib.*
8. The possession of an agent, is the possession of the principal.
Beaumont v. Covington, 189.
9. The proprietors of steam tow-boats, such as ply between New Orleans and the Gulf of Mexico, are common carriers, and responsible as such. But it does not follow, because the proprietors are responsible to others for the negligence or misconduct of all their agents and servants, that these are responsible to the proprietors for each other. Thus, the captain cannot be held responsible to the owners, for damages to which the latter were subjected in consequence of an injury to another vessel, resulting from mismanagement of the steamer during the pilot's watch, and when the captain was asleep. *Per Curiam.* It is physically impossible that the master of a vessel can always be on deck, and he cannot be held liable for every act or omission of the other officers. *Davis v. Houren, 255.*
10. It is well settled that the ratification of a principal will be inferred from his silence, if, when apprized of an act done by his agent without, or beyond his authority, he does not, within a reasonable time, express his dissent ; but no such inference will be drawn, where the act was not done in the name of the principal, nor apparently for his benefit, and the circumstances of the case sufficiently account for the silence of the principal without construing it as an acquiescence in the act. *Guimbillot v. Abat, 281.*
11. Where a third person attempts to establish the ratification of an unauthorized act of an agent, from the silence, or conduct of the principal, it must clearly appear that he has been misled thereby, or induced to forego some advantage he would otherwise have enjoyed. *Ib.*
12. An account rendered by an agent to his principal is conclusive against the former, unless he show clearly errors or omissions to his prejudice.
Mornay v. Bordelais, 318.
13. An agent authorized to sell, cannot sell to himself. *Allard v. Allard, 320.*
14. In an action to rescind a sale made by an agent, whose power to sell is conceded, the manner in which he disposed of the proceeds, whether in payment of a debt due to himself, or not, is a question not before the court. *Ib.*
15. Where an agent acts within the scope of his authority, his acts are valid, without showing any ratification on the part of his principal. *Ib.*

See EXECUTION, 11. INSOLVENCY, 12.

APPEAL.

- I. *From what Judgments an Appeal may be taken.*
- II. *Abandonment of Right to Appeal.*
- III. *Application for an Appeal.*

- IV. *Parties to Appeal.*
- V. *Citation of Appeal.*
- VI. *Effect of Appeal in Suspending Execution.*
- VII. *Record of Appeal.*
- VIII. *Answer of Appellee, and Matters urged for the first time after Appeal.*
- IX. *Judgment on Appeal.*

I. *From what Judgments an Appeal may be taken.*

1. Any error committed by a Justice of the Peace, in proceedings on an application for the removal of a tenant under the act of 3d March, 1819, relative to landlord and tenant, can only be corrected by an appeal to the Parish Court, or by an action of nullity. In case of the refusal of the Justice to allow an appeal, the remedy is by mandamus. An injunction will not lie from a District Court, to stay the proceedings under such a judgment of removal.
McLean v. Carroll, 43.
2. Where plaintiff sues for the amount of an open account, less than three hundred dollars, he cannot give jurisdiction to the Supreme Court, by claiming conventional interest from a particular period, where there was no agreement to pay it. Goodwin v. Burney, 151.
3. Where the amount really in dispute is under three hundred dollars, the appeal must be dismissed, though at the instance of the party who, by a fictitious claim for interest, attempted to bring the case within the jurisdiction of the Supreme Court. *Ib.*
4. The 19th section of the act of 25th March, 1828, amending the Civil Code and Code of Practice, which grants an appeal in any case in which it is contended that the right of imposing a tax is contrary to the constitution or to the laws of the state, whatever may be the amount of the tax, refers only to claims for taxes sued for originally before a Justice of the Peace, or an Associate Judge of the City Court of New Orleans; and where the amount claimed is under three hundred dollars the Parish Court in the Parish of Orleans, and the District Court, in the other parishes of the State, are the highest courts to which such an appeal can be taken. Though such a claim were sued for originally in the Commercial Court, no appeal can be taken to the Supreme Court. State v. Grant, 295.

II. *Abandonment of Right to Appeal.*

5. Payment of the costs of the lower court by a defendant who has taken a devolutive appeal, is not such an execution of the judgment, as will take away the right of appeal. Payment of the costs might have been compelled by execution, the appeal not being suspensive. Cuny v. Dudley, 77.
6. Plaintiff having obtained a judgment and issued execution against the defendant, certain property was seized, and sold with the consent of the latter. By an agreement between defendant and the purchaser, it was stipulated,

that if defendant should pay the amount of the judgment, with costs and interest, to the purchaser by a certain time, the sale should be null, and the property belong to defendant; otherwise, the property to belong irrevocably to the purchaser. Defendant afterwards sold his right of redeeming the property, to a third person. *Held*, that these facts amount to a compromise and satisfaction of the judgment, and deprive the defendant of the right of contesting its correctness by appeal. *Prentice v. Chewning*, 163.

7. In an action to recover a promissory note, or the amount for which it was made, with damages for its detention, the note was sequestered and delivered to the plaintiff on her giving bond to return it, in case it should be decreed to belong to the defendants. Judgment having been rendered in favor of the plaintiff for the note and damages, the defendants appealed from so much of the judgment only as related to the damages, and gave bond for a suspensive appeal in a sum fixed with reference to that part of the judgment. *Held*, that the acquiescence in the part of the judgment not appealed from, was not such a voluntary execution of the decree, as to prevent an appeal from so much of it as assessed damages.

Liles v. New Orleans Canal and Banking Company, 273.

III. *Application for an Appeal.*

8. Where an appeal is applied for after the term of the court at which judgment was rendered, it should be by petition, as required by art. 573 of the Code of Practice, and not by motion. But where an appeal has been allowed, under such circumstances; on motion, and citation has been duly served, and the other requisites complied with, it will not be dismissed for such irregularity. *Prudhomme v. Edens*, 64.

IV. *Parties to Appeal.*

9. A married woman, not separated from bed and board, cannot appeal from a judgment rendered against her, without the authorization of her husband, or that of the Judge before whom the suit is brought.
Cuny v. Dudley, 77.
10. Any creditor of the husband who alleges, that he has been aggrieved by a judgment for a separation of property between the spouses, may appeal therefrom, though not a party to the suit in the lower court. C. P. 571. C. C. 2408. *Compton v. Her Husband*, 154.
11. Where no judgment was pronounced in the inferior court on the claim of an intervenor, his appeal will be dismissed. *Frazier v. Vance*, 271.
12. Where a mortgage creditor of an insolvent who has made a cession of his property appeals from a judgment, allowing the sums claimed by certain law officers for their fees, the latter must be made parties to the appeal. It is not enough that the syndic, who has no interest in a contest between privileged creditors as to their relative rank, should be cited.

Cassidy v. His Creditors, 303.

13. Defendants sued as maker and endorser of a note, severed in their defence.

There was a judgment in favor of the plaintiff against the maker, but against him as to the endorser ; and he appealed from the latter alone. On a motion to dismiss the appeal, on the ground that the maker of the note was not made a party to the appeal: *Held*, that defendants having severed in their defence, and their interests being distinct, it was unnecessary to cite a party who had no interest in the matter in controversy between his co-defendant and the plaintiff. *Gordon v. Dreux*, 399.

14. The fact that a party is a fugitive from justice, cannot affect his right of appeal. *State v. Plazencia*, 441.

V. Citation of Appeal.

15. The true meaning of the first section of the act of 22d March, 1843, chap. 64, is, that if, at the same term at which a judgment has been rendered, an appeal be moved for in open court, no citation of appeal, or other notice to the appellee shall be necessary, he being considered to be in court during the term, and bound to take notice of what passes ; but where an appeal is applied for after the term, the usual citation must be served on the appellee.

Prudhomme v. Edens, 64.

16. Where the Clerk has neglected to deliver copies of the petition and citation of appeal to the Sheriff, to be served as required by art. 581 of the Code of Practice, on parties, residents of the parish, who were made appellees in the petition, further time will be allowed to have them cited.

Lambeth v. Vawter, 127.

17. On an appeal by the defendant, from a judgment in favor of the State, for the amount of a recognizance entered into by him for his appearance at court, the District Attorney who obtained the judgment is the proper person on whom the citation of appeal should be served.

State v. Plazencia, 441.

VI. Effect of Appeal in Suspending Execution.

18. Art. 624 of the Code of Practice, which declares, that one, in whose favor a judgment has been rendered which is subject to appeal, cannot take out execution until ten days shall have elapsed, counting from the notification to the opposite party, must be construed in connection with art. 575, of the same Code, and be understood as excluding Sundays from the ten days. It could not have been intended to allow an execution, so long as the defendant is entitled to a suspensive appeal.

Dayton v. Commercial Bank of Natchez, 17.

19. If execution be issued after a suspensive appeal, the Judge of the Inferior Court may grant an injunction to prevent a sale. *Per Curiam*. This is not to interfere with the judgment appealed from, but to insure to the appellant the benefit of his appeal. *Aubert v. Robinson*, 463.

20. An appeal from an order of seizure and sale will be suspensive, if taken within ten days, Sundays not included, from the notice of judgment to the party cast. *C. P. 575. Ib.*

VII. *Record of Appeal.*

21. Where an appeal is taken, the transcript of the record must be filed within three judicial days after the return day, or it will be too late. The rule, that when an act is to be done within a given time, it may be done afterwards if nothing occurs to prevent it, does not apply to such a case.

Van Campen v. Morris, 79.

22. Under the 18th section of the act of 28th March, 1813, a Clerk may require of an appellant security for the costs of making a transcript of the record; and, if not furnished, he may refuse to prepare it. The surety given in the appeal bond is not enough. The bond is conditional, and should the appellant succeed, the surety would be discharged. The Clerk has a right to require that the security be absolute, and that the solvency of the surety shall appear to his reasonable satisfaction. But he exercises his judgment at his peril. *State v. Phelps*, 308.
23. It is no ground for dismissing an appeal from a final judgment, that the record does not contain testimony, not reduced to writing, taken in support of an exception of the other party, the judgment sustaining which was acquiesced in by the appellant, and had its effect. *Gordon v. Dreux*, 399.

VIII. *Answer of Appellee, and Matters urged for the first time after Appeal.*

24. Where a witness has not been interrogated in the inferior court as to his means of knowing a signature to which he testified, no objection to the want of a disclosure of such means, can avail after appeal.

Berryman v. Dahlgren, 188.

25. A defence that a memorandum of a contract of sale had been altered by the plaintiffs without the consent of the defendants, not made in the lower court, cannot be urged after appeal. *Grimshaw v. Hart*, 265.
26. A prayer, by the appellee for an amendment of the judgment, filed the day before the case was called for argument, and after a joinder in error, is too late. *C. P. 890. Mooney v. Cage*, 494.

IX. *Judgment on Appeal.*

27. Where pending an appeal from a judgment removing a tutrix, the minor marries, thereby emancipating herself, the appeal, thus being without an object, will be dismissed. *Tutorship of Wilds*, 31.
28. The statement of the title of the case, and of the court from which the appeal is taken, written at the head of the opinions prepared by the Judges of the Supreme Court, is not required by law. It forms no part of the judgment, and when erroneous may be disregarded. *Lovelace v. Taylor*, 92.
29. The functions of a District Court in relation to a mandate issued from the Supreme Court to have a judgment executed, are merely ministerial. It cannot render any new judgment which can authorize an appeal, or render one necessary. Its duty is to obey the mandate, and to order the decision

of the Supreme Court to be recorded on its minutes, that it may be legally executed. C. P. 619. As soon as this is done, the party in whose favor the judgment has been rendered, has an absolute, immediate right to an execution, which cannot be suspended by any subsequent appeal. C. P. 623, 629. *Ib.*

30. An appellee will not be allowed damages for the appeal, as a frivolous one, where he has availed himself of it to ask for an amendment of the judgment of the lower court. *Gorham v. Hayden*, 450.

See HUSBAND AND WIFE, 18.

ASSAULT AND BATTERY.

See OFFENCES AND QUASI-OFFENCES, 8.

ASSIGNMENT.

See INSOLVENCY, 10, 11, 12.

ATTACHMENT.

1. Plaintiffs having obtained a judgment against defendant in another State, instituted a suit on the judgment here, attaching certain property, and, pending the attachment, transferred their judgment to one of their creditors, to be applied towards the satisfaction of his claim. A third person having intervened in the attachment suit, and proved the property to be his, claiming damages for the illegal attachment, against the plaintiffs and their transferee : *Held*, that the damage sustained by the intervenor resulted from the original levy of the attachment ; that the plaintiffs having, even after the transfer, a greater interest in the action than their transferee, the latter could not have dismissed the attachment ; and that, consequently, judgment for damages could be rendered only against the plaintiffs.

Caldwell v. Mayes, 376.

2. An attachment bond, executed in favor of the defendant, does not enure to the benefit of a third person who intervenes and establishes his right to the property. Not being a party to the bond, and there being no privity of contract between him and the plaintiff in the attachment suit, he cannot sue on it. *Edwards v. Turner*, 382.
3. As between the principal and surety in an attachment bond, and the defendant in whose favor it is executed, a claim for damages for an illegal attachment is *ex contractu* ; but if the property of a third person be attached under proceedings authorizing the seizure of that of the defendant, it is a trespass, and the right of the party injured to obtain reparation arises neither from a contract, nor a quasi-contract, but under art. 2294 of the Civil Code, which

declares that every act of man which causes damage to another, obliges him by whose fault it happened, to repair it. *Ib.*

4. The attachment of the property of a third person, as belonging to the defendant, is a quasi-offence; and the action by the owner for damages is prescribed by one year from the time of the injury—that is, from the time of the seizure, and not from the date of the judgment establishing the title of the owner. C. C. 3501, 3502. *Ib.*

ATTORNEY AT LAW.

1. An attorney at law cannot acknowledge a debt, so as to bind his client.
Hill v. Barlow, 142.
2. The purchase by one who had acted as the attorney at law of defendant, of a good and valid title to the land in controversy, from persons not parties to the litigation concerning it, is not such a purchase of a litigious right, as is declared to be null by art. 2422 of the Civil Code.
Evans v. Wilkinson, 172.

ATTORNEY, DISTRICT.

A District Attorney, prosecuting on behalf of the State, may enter a *nolle prosequi* at his discretion, subject only to the right of the defendant, after trial commenced and evidence given, to insist on a trial. The court has no right to control the attorney of the State, in this respect.

State v. Bugg, 63.

See APPEAL, 17.

BANK.

1. Under the provisions of the act of 5th February, 1842, reviving the charters of the Banks in the city of New Orleans, only the debts due to those institutions at the time of the passage of that act, can be considered as forming a part of their "*dead weight*." Debts subsequently contracted, though between the date of the passage of the act, and its promulgation, or acceptance by the Banks, are not included in the "*dead weight*."

City Bank of New Orleans v. Barbarin, 289.

2. A bank will not be considered as insolvent, merely because it has gone voluntarily, or been forced into liquidation under the act of 14th March, 1842, relative to the liquidation of banks. The provisions of the act do not authorize such a presumption, nor contemplate the insolvency of the Bank as a cause for the forfeiture of its charter; the charter may be forfeited by a violation of its provisions, without the Bank being insolvent. Commissioners of the Exchange and Banking Company of New Orleans *v. Mudge*, 387.

3. It is only when the whole amount of the capital stock of a bank, together

with its assets, is insufficient to meet its liabilities, that it can be said to be insolvent. *Ib.*

4. The provision of the act of 26th March, 1842, which declares "that nothing contained in the act to provide for the liquidation of banks, or other laws of the State, shall be so construed as to deny to any persons having notes to pay in banks in liquidation, the right of paying said notes in the bank notes of said liquidating banks;" though it mentions only *notes*, should, by a liberal and fair construction, be extended to all debts due to the banks, though not in the form of notes. The provision of the second section of the act of 5th April, 1843, "that it shall be the duty of each of the banks of the State, at all times, to receive in offset or part offset of debts due to it, its own debts when liquidated and past due, whether for circulation, deposits, or arising from any other source whatever, and whether such bank be, or be not in liquidation, and without reference to the date at which the debtor offering such transfer may have acquired the claim by him offered in offset," may be considered as declaratory of the former intention of the legislator. *Ib.*
- 5 No law of this State in existence before 1842 defined the insolvency of a corporation, or provided for its voluntary or forced liquidation. The acts of the 14th, and 26th March, 1842, and 5th April, 1843, apply alike to solvent and insolvent banks, and whether their liquidation be forced or voluntary. They are special laws, for special purposes, and are to be construed together, as *in pari materia*. To them alone, we must look for the mode of proceeding, and for the powers and duties of the commissioners of liquidation. The Legislature intended by these acts to provide specially for the holders of the notes of the banks in the course of liquidation, and to make the circulation of each bank a good offset to debts due to it. These statutes make it the duty of the commissioners to allow such offsets, and they violate no vested right, nor impair the obligation of any contract.

Ib.—Rehearing, 397.

BANK OF THE UNITED STATES.

See CONTRACTS, 5.

BANKRUPTCY.

1. A copy of a decree of a District Court of the United States sitting in Bankruptcy, certified under the signature of the Clerk, appointing an assignee to the estate of a bankrupt, and ordering him to give security in a certain sum for the faithful discharge of his duties, is sufficient evidence of the authority of the person so appointed to sue as assignee, where the exception does not state the grounds on which plaintiff's capacity is denied. It will not be presumed that the certificate was delivered, before the person so appointed had complied with the orders of the court. *Faures v. Metoyer*, 75.
2. Plaintiff having obtained an injunction from a State court, to stay an execution about to be levied on his property, was subsequently declared a bank-

rupt by the District Court of the United States, under the bankrupt law of 1841. A rule having been afterwards taken in the State court, to show cause why the injunction should not be dissolved, or further security given: *Held*, that by the decree of bankruptcy, the State court was divested of all jurisdiction, having no authority to decide questions involving the adjustment of privileges and liens among the creditors of the bankrupt, or the distribution of the funds of his estate. *Lewis v. Fisk*, 159.

3. Under the bankrupt law of 1841, all the estate of the bankrupt is, by the issuing of the decree of bankruptcy, *ipso facto*, vested in the assignee. It is his duty to take possession without delay and to administer the property to the best advantage for the benefit of the creditors. If resistance be made, the State courts will grant the necessary process to enable him to do so. The assignee may make himself a party to suits in the State courts in place of the bankrupt, and take the necessary steps to protect the property and interests confided to his care. *Ib.*
4. If the goods of one who has been declared a bankrupt under the act of 1841, be seized in execution and sold, before possession has been taken by the assignee, they may be recovered in an action against the Sheriff, or the plaintiff in execution, if he accompanied the Sheriff, or specially directed the seizure. *Ib.*

BILLS OF EXCHANGE AND PROMISSORY NOTES.

- I. *Consideration.*
- II. *Power to draw or endorse in the name of another.*
- III. *Accommodation Endorsers.*
- IV. *Indulgence, and Release of a Party.*
- V. *Protest.*
- VI. *Parties to Actions on.*
- VII. *Evidence in Actions on.*
- VIII. *Interest due on Protested Bills and Notes.*
- IX. *Payment.*

I. *Consideration.*

1. The statement on the face of a note, that the consideration for which it was given was the purchase of a tract of land, imposes no obligation on an endorsee to inquire whether his endorser had a good title to the property sold; nor does any such obligation result from its being endorsed, without recourse. *Maurin v. Chambers*, 68.
2. The maker of a negotiable note cannot urge any inquiry into its consideration, when in the hands of an endorsee, not shown to have had any knowledge of the failure of the consideration before he received it. *Ib.*

3. On a plea of usury by the maker or accommodation endorser of a note, the holder will be entitled to recover only the amount actually paid by him.

Satterfield v. Compton, 120.

4. Plaintiff having sued his lessee levied a provisional seizure on goods belonging to defendants, sub-lessees. The seizure was released on the defendants endorsing a note drawn to their order by plaintiff's tenant, for the amount of the rent due to plaintiff by the latter. To an action on the note defendants pleaded error and want of consideration. *Per Curiam*. After having endorsed the note as a compromise, and prevented the plaintiff from testing his right to seize their goods, defendants cannot be allowed to urge that they owed nothing to the plaintiff or his lessee, and that they are not bound by their endorsement, because it was given to release an unlawful seizure, under the mistaken belief that their goods were liable for the rent due to the plaintiff. C. C. 3045. Millaudon v. Worsley, 274.

II. Power to Draw or Endorse in the Name of another.

5. Payment of part of a note as agent for the defendant, by one who had drawn it in that capacity, is not evidence of his authority to bind the defendant as drawer of the note. He may have been acting as a general agent, with powers of administration only; the power to draw or endorse a note, or bill, must be express and special. C. C. 2966. Notrebe v. McKinney, 13.
6. After the dissolution of a partnership no one of the partners can use the social name so as to bind the others. Any authority to do so must be derived from a new contract between the parties, and such a contract is essentially one of mandate. To draw or endorse any bill, or note, in the name of the former partnership, the authority must be express and special. C. C. art. 2966. Rudy v. Harding, 70.

III. Accommodation Endorsers.

7. The possession of a note by the maker, after it has been endorsed by a third person, is evidence that the endorsement was an accommodation one.
Satterfield v. Compton, 120.
8. An accommodation endorser, being viewed as a surety, may avail himself of any plea which his principal could have opposed to the holder. *Ib*.

IV. Indulgence and Release of a Party.

9. Action by the transferee after maturity, against the endorers of a promissory note, executed by the maker for the price of land purchased by him from the payee, and secured by mortgage on the property sold. To enable the maker to secure, by a mortgage of the property, the payment of notes to be given by him to a Bank, in discharge of a debt due by the payee to the Bank, thereby substituting the maker to the payee as debtor to the Bank, the latter, the vendor, executed an act "releasing the mortgage given by the maker," with a stipulation "that the release shall be null and void, unless the mortgage tendered by the maker be accepted by the Bank" within

- a fixed period. *Held*, that the substitution of the maker as a debtor to the Bank, was a sufficient consideration for the contract of release; that the payee was precluded by the act from exercising his rights on the note and mortgage, until the expiration of that time; that the endorsers were sureties of the maker; but that whether considered as such, or as mere endorsers, the act having been executed without their assent, they were discharged. C. C. 3030, 3032. *McGuire v. Wooldridge*, 47.
10. The holder of a note must retain the faculty of transferring all his rights against the maker absolutely unimpaired, or the endorsers will be released. He must not agree to give time, and suspend his remedy by precluding himself from suing the maker. *Ib*.
11. If the holder of a note secured by mortgage, appear at the meeting of the creditors of an insolvent, and vote for a sale of the mortgaged property on terms of credit, he will thereby release the endorser. *Ib*.
12. In an action against the maker and endorser of a note, the defendants excepted to the action as premature, on the ground that the amount claimed by plaintiff was not yet demandable; as the latter, after the maturing of the note sued on, by a special agreement with the drawer, for a consideration received from him, had granted him a certain time within which to pay the note, which delay had not yet expired. The exception was sustained. After the expiration of the delay, the plaintiff obtained a judgment by default, which was set aside, the defendants filing separate answers, and the endorser urging that he had been discharged by the delay. There was a judgment against the maker, but in favor of the endorser. On appeal: *Held*, that though the fact of granting the delay was shown, the exception having been pleaded by both defendants, proved that the endorser knew that the delay had been granted, and consented to it, and that, having enjoyed the benefit of the plaintiff's indulgence, he is not discharged.

Gordon v. Dreux, 399.

V. Protest.

13. Where there are several post offices through which an endorser receives his letters and papers indifferently, notice of protest must be sent to the one nearest his residence; but where he habitually receives his letters and papers through the more distant one, notice through it will be valid. *Mead v. Carnal*, 73.—*Mechanics and Traders Bank of New Orleans v. Jemison*, 90.
14. Notice of protest addressed to "A. B. of the parish of [stating the parish of his residence,] at the post office at [mentioning the office at which he was in the habit of receiving his letters]," and deposited in that office, it being in the place where the protest was made, is a sufficient compliance with the second section of the act of 13 March, 1827, requiring the notice to be addressed to an endorser at his domicile, or usual place of residence. The

addition of the words "at the post office at—," does not affect the sufficiency of the direction.

Mechanics and Traders Bank of New Orleans v. Jemison, 90.

15. The mere erasure of one or more words in an act of protest, and the interlineation of others, will not annul the instrument. Notaries may, at the time, correct omissions or errors in such an act, by erasing words incorrectly used, and by interlining others; but they cannot, after the act is executed, alter or amend it in any respect. To annul an act on account of such interlineations or erasures, it must be proved that they were made after the act was executed. Marsoudet v. Jacobs, 276.

16. The act of 13th March, 1827, relative to bills of exchange and promissory notes, does not change the general commercial law in regard to the diligence to be used in serving notices of protest, but merely provides a new mode of proving such diligence. This law cannot be understood as pointing out the degree of diligence to be used. It merely instructs the notary how to proceed, where the endorser resides in another place than that of the protest, leaving him to ascertain where the notices are to be addressed.

Becnel v. Tournillon, 500.

17. A notice of protest simply directed to an endorser as in a particular parish, where there are several post offices in the parish, and the one at the seat of justice of the parish is not the nearest to his residence, is insufficient. *Ib.*

See *Evidence in actions on, infra*, 20, 21, 22, 23, 24, 25, 26.

VI. *Parties to actions on.*

18. Where an endorser, the wife of the maker of a note, could not sue the latter, her endorsee cannot. Doll v. Theurer, 276.

VII. *Evidence in actions on.*

19. A note endorsed in blank may be considered as one payable to bearer, and all the endorsements posterior to that of the payee, may be stricken out on the trial. But in an action against the maker of a note, or the drawer or acceptor of a bill, all the endorsements stated in the petition, though unnecessarily, must be proved. Gaines v. Morris, 4.
20. Objections on the ground of informality, illegality, or falsehood to the protest of a bill or note, and to the certificate of the notary as to the manner in which notice was served or forwarded, go to the effect, and not to the admissibility of the evidence. Such objections cannot authorize its exclusion. The notice and certificate are *prima facie* evidence; if proved to be informal, false, or illegal, the court or jury will disregard them.

Marsoudet v. Jacobs, 276.

21. Where a defendant offers in evidence the original of a notarial protest, for the purpose of showing, that in the part which relates to the demand and notice, it contains erasures and interlineations, and that the copy introduced by the plaintiff was not conformable to the original as to these matters, he cannot move the court to reject that part of the original which relates to

the demand and notice. *Per Curiam.* The legal consequences of the want of demand and notice, is a question entirely different from that of the reception of evidence by which they are expected to be supported or disproved.

Ib.

22. The statements of a notary, in the body of a protest, as to the demand of payment, and his certificate as to the manner of serving or forwarding notice, may be contradicted by parol. His statements and certificate are legal, but not conclusive evidence of what they contain. Act 13th March, 1827, sect. 1. Evidence to contradict them is admissible under a general denial of the allegations in the petition. Ib.
23. By the commercial law it is not indispensably necessary that the demand of payment of a promissory note, or inland bill of exchange, should be made, and the notice of non-payment given by a notary. Any person competent to testify as a witness, may do so; but the mode of proof is different in the two cases. Under the act of 13th March, 1827, sect. 1, the certificate of the notary is evidence of the demand and notice of protest; but when the demand is made, or notice given by a private individual, it must be strictly proved by the person making it, or by other competent testimony. Ib.
24. The acts of 14th February, 1821, and 13th March, 1827, authorizing notaries, and others acting as such, to demand payment of notes, bills of exchange, or orders for the payment of money, and to give notice of the protests thereof, and making their statements in the protest and certificates evidence of all that is contained in them, gives this authority to their official acts as sworn officers, and on the assumption that their acts and statements are under the sanction of their official oaths. They are expected to act themselves in making demands and giving notices. The duty cannot be delegated to others. They can only certify what they do or have done themselves, or what they know to be true of their own knowledge. The acts of 1821 and 1827 introduced no new rule as to the demand of payment and notice of protest of bills and notes, but only another mode of proving them. What will constitute legal demand and notice, depends on the general commercial law. Ib.
25. A party cannot prove by parol, a demand of payment of the drawer of a bill made by a private individual, and a notice of protest by the notary's certificate. The certificate can only be evidence of notice, when the notary makes the demand himself. Ib.
26. The first section of the act of 13th March, 1827, authorizing notaries or others acting as such, by a certificate added to the protest of a note, or bill, &c., to state the manner in which notices of protest were served or forwarded, and declaring that a certified copy of such certificate shall be evidence of all the matters therein stated, applies to acts done by the notary in his official capacity, and, therefore, within the territorial limits of his authority as such. But where an act was done by him, such as serving a notice of protest, in a parish in which he had no capacity to act, the same degree of faith and credit is not given to his written and unsworn statement. In such

a case he should be sworn and examined as an ordinary witness, as he must be considered to have acted unofficially, and not under his oath of office.

Gordon v. Dreux, 399.

VIII. *Interest due on Protested Bills and Notes.*

27. The holder of a promissory note, protested for non-payment, is entitled to interest on the amount from the day of protest. Act 14th Feb. 1821, sect. 2. Mason v. Alexander, 166.
28. The maker of a note given for the price of a tract of land, is bound, under art. 2531, of the Civil Code, to pay legal interest on the amount from the time when it became due, till payment. *Ib.*

See INTEREST, 4.

IX. *Payment.*

29. Where the holder of a note endorses on it that he has received from the maker four smaller notes, amounting together to the sum for which the first note was given, which, when paid, will be in full of the original note, he may sue on the latter, but to protect the defendant from the danger of suits by endorsees of the smaller notes, the judgment should provide that no execution be issued, nor the judgment itself be recorded by the Recorder of Mortgages, until the smaller notes are delivered to the defendant, or deposited for him in court. Rieder v. Theurer, 375.

CADDO INDIANS.

1. The Caddo tribe of Indians were never recognized as the proprietors of any lands, either by the Spanish or American governments.
Brooks v. Norris, 175.
2. The Spanish government never acknowledged any primitive title in the Indian tribes to lands on this continent. *Ib.*
3. In the treaty between the United States and the Caddo Indians, of the 1st of July, 1835, that tribe were not treated with as the owners, but merely as the occupants of the territory, from which it was the object of the government to induce them to remove. *Ib.*
4. The provision in the first supplementary article to the treaty of 1835, between the United States and the Caddo Indians, relative to a reservation in favor of the heirs of François Grappe, is a mere confirmation of such grant as may have been made by that tribe in 1801, and not a substantive grant of so much land from the government. The recital by the Indians that they had made such a grant, is not conclusive upon the government. *Ib.*

CARRIERS.

1. The proprietors of steam tow-boats, such as ply between New Orleans and the Gulf of Mexico, are common carriers, and responsible as such.
Davis v. Houren, 255.

2. The master of a vessel is answerable for the baggage and effects of a passenger delivered to him, and not restored, nor accounted for.

Cosnier v. Golding, 297.

CITATION.

1. A single citation is sufficient where the defendants, sued as tutrix and co-tutor of certain minors, are husband and wife. C. P. 182. And when not separated from bed and board, its service on either will be good. Ib. 192.

Gaines v. Morris, 4.

2. A citation which mentions neither the title of the cause, the residence of the defendant, nor the place where the office is held, in which the defendant is cited to appear and file his answer, is insufficient. C. P. 179.

Caldwell v. Glenn, 9.

3. Knowledge of the existence of an action on the part of a defendant, no matter how clearly brought home to him, cannot supply the want of citation. Ib.
4. Service of petition and citation, within the enclosures of a plantation on which the defendant resides, on a free person, apparently above the age of fourteen, shown to have resided at the time on the same plantation, but not in the dwelling house with defendant, is sufficient. *Per Curiam*. The whole plantation was the domicile of the defendant, and service on a person living on it, was good. C. P. 189. Maxwell v. Collier, 86.

See CURATOR AD HOC.

CLERK OF COURT.

1. Under the 18th section of the act of 28th March, 1813, a Clerk may require of an appellant security for the costs of making a transcript of the record; and, if not furnished, he may refuse to prepare it. The surety given in the appeal bond is not enough. The bond is conditional, and should the appellant succeed, the surety would be discharged. The Clerk has a right to require that the security be absolute, and that the solvency of the surety shall appear to his reasonable satisfaction. But he exercises his judgment at his peril. State v. Phelps, 308.
2. Where it is expressly denied that one, who styles himself the Clerk of a Court of Probates, by whom an adjudication of succession property was made, is, or was such, the certificate of the Judge of the court, at the foot of the *procès-verbal* of the sale drawn up by such Clerk, in which he styles himself the duly commissioned Clerk of the court, that the copy is a true one from the original on file in his office, is insufficient to establish his appointment, there being no general law authorizing Probate Judges to appoint Clerks to their courts. Rousseau v. Tête, 471.

CODES, ARTICLES OF, CITED, EXPOUNDED, &c.

I. *Civil Code of 1808.*II. *Civil Code.*III. *Code of Practice.*I. *Civil Code of 1808.*Book III. Tit. II. arts. 48, 53, 54. Donations *inter vivos*. Packwood v. Dorsey, 329.Tit. III. arts. 239, 240. Ratification of donations *inter vivos*. Ib.II. *Civil Code.*

10. Written instruments, by what laws governed. Jones v. Hunter, 235.

42, 43, 44. Domicil. Lowry v. Erwin, 192.

57. Absentee. Hill v. Barlow, 142.

128. Husband and wife. Deslix v. Jone, 292.

149, 150. ————— C. v. E., 135.

221, 226, 227. Natural children. Jones v. Hunter, 235.

447. Things holy, sacred, or religious. Ternant v. Boudreau, 488.

451. Things corporeal and incorporeal. Ib.

459, 460, 464, 465, 468. Moveables and immoveables. Key v. Woolfolk, 424.

480. Ownership. Ternant v. Boudreau, 488.

483. ————— Jones v. Hunter, 235.

495. Possession. Haydel v. Betts, 438.

869, 870. Successions. Ternant v. Boudreau, 488.

1027, 1028. ————— Chapman v. Kimball, 94.

1473, 1474, 1589, 1681, 1682. Donations *mortis causa*. Jones v. Hunter, 235.

1757. Contracts. Gorham v. Hayden, 450.

1784. ————— Deslix v. Jone, 292.

1799. ————— Wolf v. Rogers, 97.

1869. ————— Wilson v. Craighead, 429.

1884. ————— Twichel v. Andry, 407.

1905, 1906, 1907, 1908. Contracts. Gorham v. Hayden, 450.

1925. Contracts. Griffin v. His Creditors, 216. Gorham v. Hayden, 450.

1927. ————— Gorham v. Hayden, 450.

1928. ————— Griffin v. His Creditors, 216.

1929. ————— Ib. 216—Rehearing, 225.

1933. ————— Griffin v. His Creditors, 216.

1982. ————— Hill v. Barlow, 142.

1987. Rights not liable for payment of debts. Buard v. De Russy, 111.

2047, 2048, 2049. Contracts. Griffin v. His Creditors, 216.

2075. ————— Bourgerol v. Allard, 351.

2080. Actions on joint contracts. Ib.

2119. Contracts. Gorham v. Hayden, 450.
 2120. ————— Mexican Gulf Railway Company v. Viavant, 305.
 2121. ————— Griffin v. His Creditors, 225.
 2157. §§ 1. 3, Subrogation. Gordon v. His Creditors, 328.
 2162. Imputation of payment. Griffin v. His Creditors, 216.
 2205. Compensation. Maxwell v. Collier, 86.
 2214. Confusion. Griffin v. His Creditors, 216.
 2225. Contracts. Wilson v. Craighead, 429.
 2223. Authentic act. Faulk v. Pinnell, 26.
 2251. Recognitive acts. Brooks v. Norris, 175.
 2252. ————— Wilson v. Craighead, 429. Citizens Bank of Louisiana v. Tucker, 443.
 2294. Offences and quasi-offences. Edwards v. Turner, 382.
 2317, 2329. Husband and wife. Buard v. De Russey, 111.
 2361, 2362. ————— Pinckney v. Mulhollan, 41.
 2367. ————— Oliver v. Her Husband, 36. Compton v. Her Husband, 154.
 2371, 2372, 2373. Husband and wife. Prudhomme v. Edens, 64.
 2374, 2377. ————— Babin v. Nolan, 508.
 2379, 2380, 2381, 2382, 2387. Husband and wife. Chapman v. Kimball, 94.
 2399. Husband and wife. Davock v. Darcy, 342.
 2406. ————— Dugas v. Her Husband, 527.
 2408. ————— Compton v. Her Husband, 154.
 2412. ————— Prudhomme v. Edens, 64. Deslix v. Jone, 292.
 Twichel v. Andry, 407.
 2414. Sale. Gorham v. Hayden, 450.
 2415. — Haydel v. Betts, 438.
 2422. — Evans v. Wilkinson, 172.
 2487. — McCollom v. McCollom, 506.
 2495. — Lacour v. Landry, 488.
 2531. — Minor v. Alexander, 166. Daigle v. Bruzzé, 418.
 2535. — Rousseau v. Tête, 471. Lacour v. Landry, 487.
 2589. — Nash v. Parke, 324.
 2598. — Winn v. Elgee, 100.
 2600, 2601. — Rousseau v. Tête, 471.
 2622. — Evans v. Wilkinson, 172.
 2655, 2656, 2659. Lease. Bowles v. Lyon, 262.
 2675, 2676, 2677. — Deslix v. Jone, 292.
 2739, 2740. Undertakers. Succession of Erard, 333.
 2743. Privilege. Ib.
 2744. — Ib. Dumont v. Roman Catholic Church of Ascension, 532.
 2745, 2746. — Succession of Erard, 333.
 2796. Partnership. Lambeth v. Vawter, 127.
 2797. — Bourgerol v. Allard, 351.
 2833. — Lallande v. Bouny, 363.

2843. Partnership. Bourgerol v. Allard, 351.
 2844. ——— Griffin v. His Creditors, 216.
 2845. ——— Rudy v. Harding, 70.
 2847. ——— Lambeth v. Vawter, 127.
 2895. Loan on interest. Griffin v. His Creditors, 216.
 2966. Mandate. Notrebe v. McKinney, 13. Rudy v. Harding, 70.
 3029. Surety. Metoyer v. Trezzini, 124.
 3030, 3032. Surety. McGuire v. Wooldridge, 47.
 3045. Compromise. Millaudon v. Worsley, 274.
 3184. Privilege. Tanner v. Tanner, 35. Welsh v. Shields, 484.
 3185. ——— Tanner v. Tanner, 35.
 3204, §§ 6, 7, 11. 3213. Privilege. Millaudon v. Martin, 534.
 3215. Privilege. Caseaux v. His Creditors, 268.
 3221 to 3225. Privilege. Tanner v. Tanner, 35.
 3226. ——— Ib. Welsh v. Shields, 484.
 3227 to 3234. ——— Tanner v. Tanner, 35.
 3235. ——— Ib. Succession of Erard, 333.
 3236, 3237. ——— Tanner v. Tanner, 35.
 3243. ——— Welsh v. Shields, 484.
 3280. Mortgage. Compton v. Her Husband, 154.
 3314. ——— Minor v. Alexander, 166.
 3316, 3333. Mortgage. Ib. Lejeune v. Hébert, 419.
 3366, 3368. ——— Twichel v. Andry, 407.
 3408, 3409. Prescription. Wells v. Hickman, 1.
 3414, 3415. ——— Lowry v. Erwin, 192.
 3416. ——— Haydel v. Betts, 438.
 3424. ——— Kittridge v. Landry, 477.
 3426, 3427. ——— Arbonneaux v. Letorey, 456.
 3450, 3452. ——— Lowry v. Erwin, 192.
 3482, 3484. ——— Hill v. Barlow, 142.
 3486. ——— Davis v. Houren, 255.
 3499, 3500. ——— Ib. Millaudon v. Martin, 534.
 3501, 3502. ——— Edwards v. Turner, 382.
 3503. ——— Arbonneaux v. Letorey, 456.
 3510. ——— Verdun v. Splane, 530.
 3516, 3517. ——— Hill v. Barlow, 142. Davis v. Houren, 255.

III. Code of Practice.

7. Mixed actions. Winter v. Zacharie, 466.
 21. Actions how proceeded with, where party dies. Thomas v. Cortes, 44.
 35. Equitable action. Twichel v. Andry, 407.
 47. Possessory action. Winn v. Elgee, 100.
 49. ——— Wells v. Hickman, 1.
 89. Competency of judge. Boner v. Elgee,
 107. Action by a wife. Compton v. Her Husband, 154.

- 116. Action against absentees. *Hill v. Barlow*, 142. *Beaumont v. Covington*, 189.
- 118. Action against married women. *Twichel v. Andry*, 127.
- 120. Action against heirs. *Thomas v. Cortes*, 44.
- 128. Jurisdiction of Parish courts. *Hagan v. Hart*, 427.
- 129. Jurisdiction. *Boner v. Elgee*, 6.
- 149. Cumulation of several demands in same action. *Blake v. His Creditors*, 520.
- 153, 154. Principal and incidental demands. *Winter v. Zacharie*, 466.
- 162. Actions when to be brought. *Boner v. Elgee*, 6. *Winter v. Zacharie*, 466.
- 163. ————— *Winter v. Zacharie*, 466.
- 177. Service of petition. *Hill v. Barlow*, 142.
- 179. Citation. *Caldwell v. Glenn*, 9.
- 182. Service of citation and petition. *Gaines v. Morris*, 4.
- 189. ————— *Maxwell v. Collier*, 86.
- 192. ————— *Gaines v. Morris*, 4.
- 194, 195. ————— *Hill v. Barlow*, 142.
- 310, 311, 312. Judgment by default. *Caldwell v. Glenn*, 9.
- 313. Assessing of damages. *Liles v. New Orleans Canal and Banking Company*, 273.
- 336. Exceptions, when to be pleaded. *Lejeune v. Hébert*, 419.
- 345, 346. Peremptory exceptions. *Ib.*
- 351, 352. Interrogatories to a party. *Crocker v. Turnstall*, 354.
- 353. ————— *Wells v. Hickman*, 1.
- 361. Actions how proceeded with after death of a party. *Thomas v. Cortes*, 44.
- 367. Plea of compensation. *Maxwell v. Collier*, 86.
- 395, 397, 398. Opposition of third persons. *Hagan v. Hart*, 427.
- 441. Experts. *Mooney v. Cage*, 494.
- 442. ————— *Ib. Babin v. Nolan*, 508.
- 451. Experts, auditors, &c. *Babin v. Nolan*, 508.
- 453, 456. Experts, auditors, &c. *Mooney v. Cage*, 494.
- 458, 461. ————— *Babin v. Nolan*, 508.
- 491. Discontinuance. *Crocker v. Turnstall*, 354.
- 571. Appeal. *Compton v. Her Husband*, 154.
- 573. ————— *Prudhomme v. Edens*, 64.
- 575. ————— *Dayton v. Commercial Bank of Natchez*, 17. *Aubert v. Robinson*, 463.
- 581. ————— *Lambeth v. Vawter*, 127.
- 617. Execution of judgments. *Hagan v. Hart*, 427.
- 619, 623. ————— *Lovelace v. Taylor*, 92.
- 624. ————— *Dayton v. Commercial Bank of Natchez*, 17.
- 629. ————— *Lovelace v. Taylor*, 92. *Hagan v. Hart*, 427.
- 656 to 658. ————— *Winn v. Elgee*, 100.

659. Execution of judgments. *Ib.* Goubeau v. New Orleans and Nashville Rail Road Company, 345.
660. ————— Winn v. Elgee, 100.
- 661, 662. ————— *Ib.* Goubeau v. New Orleans and Nashville Rail Road Company, 345.
- 664, 665. ————— Lawrence v. Bowman, 21.
667. ————— Goubeau v. New Orleans and Nashville Rail Road Company, 345.
683. ————— Twichel v. Andry, 407.
685. ————— Winn v. Elgee, 100.
688. ————— Twichel v. Andry, 407.
690. ————— Winn v. Elgee, 100. Succession of Goodrich, 107.
691. ————— Winn v. Elgee, 100.
- 706, 707. ————— Twichel v. Andry, 407.
708. ————— Griffin v. His Creditors, 216.
715. Rights of purchaser of property subject to general mortgage to require discussion. Holmes v. Hemken, 51.
722. Privilege acquired by seizure under *fi. fa.* Lott v. Gray, 152. Caseaux v. His Creditors, 268. Goubeau v. New Orleans and Nashville Rail Road Company, 345.
723. Privilege acquired by seizure under *fi. fa.* Goubeau v. New Orleans and Nashville Rail Road Company, 345.
733. Executory process. Faulk v. Pinnell, 26.
735. ————— Lowry v. Erwin, 192. Aubert v. Robinson, 463.
747. ————— Stone v. Minor, 29.
762. Sheriffs. Winn v. Elgee, 100.
- 888, 889. Appeal. Holmes v. Hemken, 51.
890. ————— *Ib.* Mooney v. Cage, 494.
924. Courts of Probate. Thomas v. Cortes, 44.
964. Action against absentees. Hill v. Barlow, 142.
- 1000, 1001, 1002, 1003. Successions. Caldwell v. Glenn, 9.
1034. Summary cases. *Ib.*
- 1055, 1056, 1057. Claims against successions. Wilson v. Murrell, 68.

COMPENSATION.

1. A plaintiff on recovering a slave, will not be compelled to pay for the food and clothing of her children while in possession of defendant, where the value of her services was equivalent to any such expense. Allen v. Allen, 104.
2. Plaintiff having sued for the amount of a bill, for services, as a physician, rendered by him to defendant; the latter pleaded in compensation a note, for a larger amount, drawn by plaintiff to his order, held by him, and not

prescribed at the date of the services rendered : *Held*, that plaintiff's claim was extinguished by compensation. *Arbonneaux v. Letorey*, 456.

See BANK, 4. PLEADING, 17.

COMPROMISE.

Plaintiff having sued his lessee, levied a provisional seizure on goods belonging to defendants, sub-lessees. The seizure was released on the defendants endorsing a note drawn to their order by plaintiff's tenant, for the amount of the rent due to plaintiff by the latter. To an action on the note defendants pleaded error and want of consideration. *Per Curiam*. After having endorsed the note as a compromise, and prevented the plaintiff from testing his right to seize their goods, defendants cannot be allowed to urge that they owed nothing to the plaintiff or his lessee, and that they are not bound by their endorsement, because it was given to release an unlawful seizure under the mistaken belief that their goods were liable for the rent due to the plaintiff. *C. C. 3045. Millaudon v. Worsley*, 274.

CONFLICT OF LAWS.

The 6th article of the act of the Legislature of Pennsylvania, of the 18th of February, 1836, incorporating the Bank of the United States, fixing the rate of discount at which loans may be made by the Bank, does not apply to contracts made by it in other States of the Union. The validity of such contracts must be tested by the laws of the place where they may have been entered into. *Erwin v. Lowry*, 28.

CONFUSION.

Where the creditor becomes the purchaser of property sold at her instance at a Sheriff's sale, subject to her mortgage and privilege as vendor, the debt secured by such mortgage and privilege is, *pro tanto*, extinguished by confusion. She cannot claim to have the price bid by her imputed to another debt, so as to affect the rights of other creditors.

Griffin v. His Creditors, 216.

CONSTITUTION.

1. The legislative authority has no power to fix, by a declaratory act, or otherwise, a construction of the constitution of the State, which shall be binding on the judicial department. If the courts occasionally rely upon legislative construction of acts of ordinary legislation, it is because, as to them, the Legislature has a right to repeal, or modify them, or to settle their construction in cases of ambiguity, by a declaratory act.

Cotton v. Brien, 115.

2. The provision of the 17th sect. of the act of 10th February, 1841, which declares that the cases then pending before the District Court of the First District, and the Parish and Commercial Courts of New Orleans, "shall be stricken from the jury docket, unless the compensation fixed by that act to be allowed to jurors, be advanced by the party demanding a trial by jury," is not unconstitutional. *Per Curiam*. Under the twentieth section of the sixth article of the State Constitution no acquired rights, or existing contracts can be affected by subsequent legislation; but it is otherwise as to remedies and forms of proceeding. Whatever relates to the manner of conducting and trying a suit, (*litis ordinatio*.) is always within the control of the Legislature, which can, at any time, make any change, or modification it may think conducive to the public good and the proper administration of justice. *Baldwin v. Bennett*, 309.

See MISSISSIPPI, STATE OF.

CONTINUANCE.

It is within the discretion of the court, after the trial has commenced, to continue the case for the admission of further evidence.

Metoyer v. Larenandière, 139.

See EVIDENCE, 36.

CONTRACTS.

- I. *Form of Executing, and Parties to Contracts.*
- II. *Illegality or Nullity of Contracts.*
- III. *Joint Contracts.*
- IV. *Stipulations Pour Autrui.*
- V. *Obligation of the Parties, and Damages for Non-Performance.*

I. *Form of Executing, and Parties to Contracts.*

- 1. From the moment that one to whom a proposition is made for a contract, refuses to confirm it, the offer is at an end; nor can it be revived by his subsequent assent. *C. C.* 1799. Such an offer must be accepted *in toto*, to render it obligatory. *Wolf v. Rogers*, 97.
- 2. A husband can contract with his wife only in the cases specially authorized by law. *Doll v. Theurer*, 276.
- 3. A subscriber for the stock of an incorporated company cannot take advantage of any informalities in the manner of his subscription, unless in case of fraud or error. He will be bound to pay the amount subscribed by him,

though books of subscription were not regularly opened according to the charter. *Mexican Gulf Railway Company v. Viavant*, 305.

4. Contracts are solemn, or ordinary. As the latter depend for their validity on the ascertained will of the parties, the formalities prescribed in relation to them are only *probationis causa*, and may be supplied by confirmation or ratification; while as to the former, the formalities required being *solemnitatis causa*, and essential to their validity and legal existence, cannot be supplied by any ratification, express or implied. Of this class are donations *inter vivos*. *Packwood v. Dorsey*, 329.

See HUSBAND AND WIFE, 13, 15. MINOR, 4, 5, 7.

II. *Illegality or Nullity of Contracts.*

5. The 6th article of the act of the Legislature of Pennsylvania, of the 18th of February, 1836, incorporating the Bank of the United States, fixing the rate of discount at which loans may be made by the Bank, does not apply to contracts made by it in other States of the Union. The validity of such contracts must be tested by the laws of the place where they may have been entered into. *Erwin v. Lowry*, 28.
6. Whatever is done in contravention of a prohibitory law is null and void, though no penalty be denounced by the law for its violation. So, of every act contrary to public policy. Their nullity is pronounced by the general principle of the law, and is applied by the courts as cases may arise.
Cotton v. Brien, 115.
7. Where notes were given by defendant and another person, for a purchase made in violation of a prohibitory law rendering the transaction null and void, the substitution of a single note by defendant alone for a balance due after a part payment, will not bar the latter from pleading the illegality of the original contract. *Per Curiam*. The debt does not cease by the release of one of the original debtors, to be the same debt, growing out of the same transaction. *Ib*.
8. No contract between a debtor and one of his creditors, for the purpose of securing a just debt, though the debtor were insolvent to the knowledge of the creditor, and although the other creditors be injured thereby, can be annulled after one year, reckoning from its date to the time of bringing the suit to avoid it. *C. C. 1982. Hill v. Barlow*, 142.
9. The nullity of the principal obligation involves that of the penal clause. *C. C. 2119. Gorham v. Hayden*, 450.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 9.

III. *Joint Contracts.*

10. In every suit on a joint contract, all the obligors must be made defendants, though some may have paid their proportion of the debt; and no judgment

can be obtained against any, unless it be proved that all joined in the obligation, or are by law presumed to have done so. C. C. 2080.

Bourgerol v. Allard, 351.

11. Where it is not proved that one of the defendants in an action to enforce a joint obligation, ever entered into it, there must be a judgment as in case of nonsuit. *Ib.*

IV. *Stipulations Pour Autrui.*

12. Plaintiff, a builder, having erected certain houses on lots belonging to the husband of the appellant and a third person, the wife intervened in a notarial act of settlement between the builder and her husband, and his co-proprietor, for the purpose of renouncing her legal mortgage on her husband's property. It was stipulated by the act, that certain notes should be given by the husband and his co-proprietor, for a balance of the price due to the builder, which were executed and identified with the act; and the builder's privilege was expressly reserved to the amount of the notes. The appellant having subsequently obtained a judgment of separation of property, ascertaining her rights, levied a *fi. fa.*, on all the property of the husband, and, among the rest, on his undivided half of the lots on which the buildings were erected. The whole was adjudicated to the appellant, who, in part payment of the price, assumed to pay the amount of the note sued on, *as due to the builder by privilege in his favor resulting from a building contract.* In an action against the wife for the amount of the note: *Held*, that though the debt originated in a contract of the husband's for improving his own property, the price of the property purchased at the Sheriff's sale, was the consideration for which she assumed to pay the debt, which was contracted for her private benefit (C. P. 683, 706, 707;) that the stipulation in the act was for the benefit of a third person, who, by the institution of the suit, consented to avail himself of the advantage stipulated in his favor (C. C. 1884. C. P. 35;) that plaintiff acquired under the stipulation, the right of exercising his privilege on the property subject thereto, and also of enforcing his claim against the appellant personally; and that there should be judgment for the plaintiff. *Twichel v. Andry*, 407.

13. An undertaker, having contracted with defendants to erect a building for them, employed plaintiff to furnish the materials for the roof, and to construct it. By a resolution, the defendants subsequently stipulated with the undertaker, that they should retain the cost of the roof out of the amount due to the undertaker, to be paid to plaintiff on the order of the undertaker. It was proved that defendants retained, at the date of the resolution, a sum sufficient to pay for the roof, and that it was not paid out in conformity to their stipulation, on the order of the undertaker. In an action by plaintiff for the cost of the roof: *Held*, that any payments made without the order of the undertaker, were irregular, and cannot prejudice plaintiff's right to recover. C. C. 2744. Judgment against defendants for the cost of the roof. *Dumont v. Roman Catholic Church of Ascension*, 532.

V. Obligation of the Parties, and Damages for Non-Performance.

14. Where the object of a contract is anything but the payment of money, the parties may determine the sum that shall be paid as damages for its breach, and the courts will lend their aid to carry the agreement into effect. C. C. 1928. *Aliter*, where the contract is to pay a sum of money. In such a case, no damages exceeding the highest rate of interest allowed by law, can be stipulated. The damages due for delay in the performance of an obligation to pay money, are called interest. The creditor is entitled to such damages, without proving any loss; and he can recover no more, no matter what loss he may have sustained. C. C. 1929.

Griffin v. His Creditors, 216.

15. Defendants having offered a reward of a certain sum, for the apprehension and conviction of any of the persons engaged in the circulation of certain counterfeit bills, plaintiff, who had arrested and procured the conviction of one of the persons, claimed the reward. Defendants refused to pay the amount on the ground that they had already paid the sum named to others who had undertaken to effect the arrest of some of the offenders, but who had not succeeded in convicting any. *Held*, that admitting that the defendants were bound to pay but one reward, the conviction, by the plaintiff's procurement, entitled him to it. *Van Buren v. The Citizens' Bank of Louisiana*, 379.

16. Where a party to a contract enters into a new agreement, by which the execution of the first is rendered impossible, the other party will be absolved from any penalty, for failing to comply with its provisions.

Gorham v. Hayden, 450.

See MEXICAN GULF RAILWAY COMPANY, 1.

COSTS.

Under the 18th section of the act of 28th March, 1813, a Clerk may require of an appellant security for the costs of making a transcript of the record, and, if not furnished, he may refuse to prepare it. The surety given in the appeal bond is not enough. The bond is conditional, and should the appellant succeed, the surety would be discharged. The Clerk has a right to require that the security be absolute, and that the solvency of the surety shall appear to his reasonable satisfaction. But he exercises his judgment at his peril. *State v. Phelps*, 308.

COURTS.

- I. *Supreme Court.*
- II. *District Courts.*
- III. *Probate Courts.*

IV. *Parish Courts.*V. *Commercial Court of New Orleans.*VI. *Courts of the United States.*I. *Supreme Court.*

See APPEAL. *Infra* 1, 4, 7, 8.

II. *District Courts.*

1. The functions of a District Court in relation to a mandate issued from the Supreme Court to have a judgment executed, are merely ministerial. It cannot render any new judgment which can authorize an appeal, or render one necessary. Its duty is to obey the mandate, and to order the decision of the Supreme Court to be recorded on its minutes, that it may be legally executed. C. P. art. 619. As soon as this is done, the party in whose favor the judgment has been rendered, has an absolute, immediate right to an execution, which cannot be suspended by any subsequent appeal. C. P. 623, 629. If the mandate of the Supreme Court be not obeyed, the party obtaining the judgment must enforce it by a *mandamus*; and he against whom it has been rendered, if he thinks himself injured by the manner in which the execution is ordered, must seek relief by a *supersedeas*.

Lovelace v. Taylor, 92.

III. *Probate Courts.*

2. Where a defendant in an action to recover a sum of money dies *pendente lite*, if the heirs be of age and have accepted the succession unconditionally, they may be made parties, and the suit must be prosecuted to judgment in the ordinary courts; but where the succession has not been accepted purely and simply, and is in the hands of an administrator, curator, or executor, Courts of Probate have exclusive jurisdiction to decide on all claims for money against it, and to establish the rank of the privileges, and the mode of payment. C. P. 924. Thomas v. Cortes, 44.
3. It does not follow from the provisions of arts. 21, 120, and 361 of the Code of Practice, that actions shall not abate by the death of one of the parties, but may be continued between the survivor and the heirs of the deceased, that they must continue to be prosecuted in the courts in which they were instituted. All such actions founded on claims for money, on the death of the defendant, must be cumulated with the mortuary proceedings in the Probate Court, and there prosecuted to judgment, unless admitted by the administrator. The creditors have the right of contesting each other's claims in a *concurso*, before the Probate Court, by which they will be paid a *pro rata* dividend in case of the insolvency of the succession. Though no express provision has been made for the transfer of such actions, the law

has, by investing the Court of Probates with jurisdiction, impliedly conferred the means necessary to its exercise. The transfer of the record is necessary to the exercise of jurisdiction by the Probate Court. *Ib.*

4. An order of seizure and sale cannot be obtained either from a state court, or a court of the United States, against mortgaged property composing part of a succession represented by an executor, administrator, or curator, and in the course of administration in a Court of Probates.

Lowry v. Erwin, 192.

5. A judgment rendered by a court of the United States, cannot be executed by the seizure and sale of the property of an insolvent succession, under the administration of an executor, curator, or administrator. It can only be satisfied by presenting it to the Court of Probates, under whose direction the succession is being administered, for classification, and payment in due course of administration. Nor can a court of the United States issue an order of seizure and sale, (executory process,) against property belonging to such a succession. It wants jurisdiction, *ratione materiae*. Such jurisdiction belongs exclusively to the Court of Probates.

Collier v. Stanbrough, 230.

6. The administrator of an estate is amenable, during his lifetime, to the Probate Court from which he derives his authority; but where he dies without having rendered an account, it can be rendered only in the Probate Court in which his own estate is being administered. But a claim of the person who afterwards became administrator against his intestate, acquired before he became administrator, must be prosecuted before the court in which the succession of the intestate was opened. *Thomas v. Bourgeat*, 435.
7. A crop, made after the dissolution of the community, by the husband, on land belonging to him, partly with his own slaves, and partly with those of the community, cannot be considered as belonging to the community, nor be included in its settlement before the Probate Court. The husband is bound to account to the heir for the value or proceeds of the labor of the slaves, having acted as his *negotiorum gestor* in the administration of his property; but this has nothing to do with the settlement of the community. The action of the heir, must be brought before the ordinary tribunals.

Babin v. Nolan, 508.

See PARISH JUDGE. *Infra* 14.

IV. Parish Courts.

8. Though the Code of Practice (arts. 395, 397, 617, 629,) provides that the execution of a judgment belongs to the court which rendered it, and that an opposition, by which a third person pretends to be the owner of the thing seized, must be made before the court which gave the judgment, or issued the order of seizure; yet, where a plaintiff sets up title in himself to a slave, shown to be worth more than three hundred dollars, and bases his injunction, or opposition, on his right of ownership, a question is presented which no Parish Court, except that of the parish of Orleans, can try, the jurisdic-

tion of such courts being limited, (C. P. 123,) and no provision having been made for an appeal from their decisions to the Supreme Court. Such a case is, *ex necessitate rei*, an exception to the rules laid down for ordinary cases. Art. 397 must be considered as only applicable to those cases in which the value of the property seized is within the jurisdiction of the court issuing the execution; in other cases the opposition, or injunction, which the Code of Practice, (art. 398,) considers a separate demand, even when brought before the court which granted the order of seizure, must be taken into a court having jurisdiction, co-extensive with the right claimed.

Hagan v. Hart, 427.

See PARISH JUDGE.

V. Commercial Court of New Orleans.

9. The Commercial Court of New Orleans has no jurisdiction of an action to recover damages for an illegal seizure and sale of property. Act 14 March, 1839, sect. 3. The want of jurisdiction in such a case being *ratione materiae*, the Judge is bound to notice it, though not pleaded by the defendant.

Greiner v. Thielen, 365.

VI. Courts of the United States

10. An affidavit to disprove one made by the opposite party, for the purpose of removing a case from a State Court to a Circuit Court of the United States, under the 12th section of the act of Congress of the 24th September, 1789, is inadmissible. The citizenship of the parties is a fact to be shown to the satisfaction of the court, and this showing is necessarily *ex parte*. The order of removal is not final; it is for the United States Court to decide ultimately upon its jurisdiction, which may remand the case to the State Court, should it think itself without jurisdiction.

Franciscus v. Surget, 33.

11. Under the grants of jurisdiction to the Circuit Courts of the United States, by the 11th section of the act of Congress of 24 September, 1789, those courts are of limited jurisdiction, having cognizance not of cases generally, but only of a few, under special circumstances; and the presumption is, not that a cause is within its jurisdiction unless the contrary appears, but that it is without it, unless the contrary be shown.

Lowry v. Erwin, 192.

12. A Circuit Court of the United States is without jurisdiction *ratione personae*, of a suit between parties, all of whom reside out of the State in which the court is held. *Ib.*
13. The provision of the 11th section of the act of Congress of 24 Sept., 1789, "that the Circuit Courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature," &c., means that where a citizen of the state can sue in the state courts another citizen or resident, an alien, or a citizen of another state may institute a similar suit in the Circuit Court of the United States,

for a similar cause of action, and that he shall be entitled to the same remedy. *Ib.*

14. A creditor, residing in another state, cannot sue in the Circuit Court of the United States, an executor, curator, or administrator of an estate, in course of administration in a Court of Probates, as an insolvent estate, and obtain judgment, and issue execution thereon in violation of the state laws, and take the property out of the hands of the officer administering it, to the injury of the domestic creditors. But if such executor, administrator, or curator, refuse to admit the justice of a debt claimed by an alien or non-resident, and to class it as an acknowledged debt against the succession to be paid as others, he may be sued in the Circuit Court of the United States, and a judgment liquidating the demand may be obtained; but the judgment must provide that it is to be paid in due course of law, out of the assets in the hands of the executor, &c., to be administered, and no execution can be issued in favor of an alien or non-resident creditor, unless one could be issued, in a similar case, in favor of a domestic creditor. *Ib.*
15. Local laws of the states can never confer jurisdiction on the courts of the United States. They can only furnish rules to ascertain the rights of the parties, and thus assist in administering the proper remedies, where jurisdiction has been vested by the laws of the United States.

Collier v. Stanbrough, 230.

See BANKRUPTCY, 2, 3. JUDGMENT, 3. MARSHAL OF THE UNITED STATES IN LOUISIANA. *Supra* 4, 5.

CURATOR AD HOC.

1. Acceptance of service of citation by a curator *ad hoc* appointed to represent an absent defendant, will not interrupt prescription as to the latter. Art. 177 of the Code of Practice which provides for the waiver, or acknowledgment of service, in writing, under the signature of the defendant or his attorney, on the back of the original petition, does not apply to a curator *ad hoc*. Such waiver or acknowledgment can only be made by the defendant personally, or by the attorney whom he has employed. *Hill v. Barlow*, 142.
2. Service of a petition and citation upon a curator *ad hoc*, amounts to a notification of his appointment. The process must be regularly served, and until then he has no capacity to act; nor can he waive any of the legal proceedings required for the protection of the rights of the absentee he is called upon to defend. *Ib.*
3. The powers of a curator *ad hoc* must be strictly limited to those conferred by law. They cannot be extended to the performance of any other acts than such as tend to the defence of the rights and interests of the absentee whom he represents. He cannot waive, prospectively, on behalf of his client, the production of legal evidence; nor bind him by agreeing to dispense with the forms of law in taking it. He cannot surrender any lawful means of defence, to the injury of those he represents. *Ib.*

4. A curator *ad hoc*, may be appointed to represent an absent defendant in a petitory action, as in any other. Art. 116 of the Code of Practice, does not limit the right of appointment to any particular class of actions.

Beaumont v. Covington, 189.

5. Where a curator *ad hoc*, is a sworn attorney, he will be presumed to have done his duty. So, where a second curator *ad hoc* has been appointed, *pendente lite*, it will be presumed that the first appointment was vacated, by death, or otherwise. *Ib.*

DAMAGES.

Damages can be assessed only by a jury; and in suits before the District Court of the First District, or the Parish, or Commercial Courts of New Orleans, the plaintiff must advance the compensation allowed to the jurors by the 17th sect. of the act of 10th February, 1841, where the defendant has not done so. C. P. 313.

Liles v. New Orleans Canal and Banking Company, 273.

See APPEAL, 28. INJUNCTION, 2, 6. OFFENCES AND QUASI-OFFENCES.

DISMISSION OF ACTION.

See JUDGMENT, 11.

DISCONTINUANCE.

A plaintiff may discontinue his action, at any time before judgment has been rendered, on paying the costs. C. P. 491. But he has no right to call upon the court for a judgment of nonsuit. As a general rule, when the plaintiff does not make out his case, the judgment against him should be one of nonsuit; but there are circumstances which render this rule inapplicable, and which ought to be considered sufficient to put an end to the matter in litigation. Such circumstances, growing out of the evidence, are to be left to the sound and legal discretion of the court, without any interference on the part of the parties. Crocker v. Turnstall, 354.

DOMICIL.

1. Service of petition and citation, within the enclosures of a plantation on which the defendant resides, on a free person, apparently above the age of fourteen, shown to have resided at the time on the same plantation, but not in the dwelling house with defendant, is sufficient. *Per Curiam*. The whole plantation was the domicile of the defendant, and service on a person living on it, was good. C. P. 189. Maxwell v. Collier, 86.

2. Articles 42, 43, 44 of the Civil Code, provide for a change of domicile only as to persons already residents of the state, and not as to those coming from other states. As to them, an actual residence of twelve months within the state, is required, before a domicile can be acquired. Lowry v. Erwin, 192.

DONATIONS INTER VIVOS.

1. A donation *inter vivos* of real estate, made while the Code of 1808, was in force, is null and void, unless executed before a Notary Public, and two witnesses, and accepted in express terms by the donee during the life of the donor. Book III. tit. II. arts. 53, 54. Packwood v. Dorsey, 329.
2. A donation *inter vivos* of real property, null for want of the formalities prescribed by law, cannot be ratified by any confirmative act on the part of the donor; nor will the voluntary execution of the donation by the donor, prevent him from pleading its nullity. Code of 1808, Book III. tit. III. art. 239. But the confirmation, ratification, or voluntary execution of such a donation by the heirs or assigns of a donor, after his death, will render it binding on them. *Ib.* art. 240. *Ib.*
3. Contracts are solemn, or ordinary. As the latter depend for their validity on the ascertained will of the parties, the formalities prescribed in relation to them are only *probationis causa*, and may be supplied by confirmation or ratification; while as to the former, the formalities required being *solemnitatis causa*, and essential to their validity and legal existence, cannot be supplied by any ratification, express or implied. Of this class are donations *inter vivos*. *Ib.*

DONATIONS MORTIS CAUSA.

1. The testimony of a Probate Judge, in whose office a will should have been deposited, that he had seen the will in his office, but had searched for it in vain, cannot authorize the introduction of parol evidence of its contents, and of its having been proved and ordered to be executed, where the minutes of the Probate Court are not produced, nor alleged to have been mislaid, lost, or destroyed. Such evidence, though admitted without objection, would be insufficient to establish the will. Dash v. Dosson, 11.
2. It is not necessary that a testament made in another State should be executed according to the forms prescribed by our laws to have effect here. It is sufficient that it be clothed with all the formalities prescribed for its validity in the place where it was made, by the laws of which its form is to be governed. C. C. 1589. Jones v. Hunter, 235.
3. Where a will executed in another State has been admitted to probate there, by a court of competent jurisdiction, it will be presumed that the formalities required by the laws of that State were complied with, and that the judgment of the court was rendered after due and legal proceedings. No objection that it was not proved according to those laws will be listened to. *Ib.*

4. An omission to state, in the certificates appended to an exemplification of a will and of the probate thereof in another State, that the Judge who certifies to the correctness of the copy is *the presiding Judge*, is immaterial, where it is well known that the Probate Courts of that State are composed of but a single Judge. Act of Congress of 26th May, 1790. *Ib.*
5. Though a will, made in another State according to its laws, may have effect and be executed here, its dispositions or effect, where the property disposed of is situated here, must be governed by our laws—*lege rei sitæ*—not by the law of the place of its execution. C. C. 10, 483. *Ib.*
6. The acknowledgment of an illegitimate child in a will, is sufficient to entitle such child, when not a colored one, to be considered a duly acknowledged natural child, and to receive as such. C. C. 221, 226, 227. *Ib.*
7. Art. 1589, of the Civil Code, creates no exception to the rule, that the transmission of immoveable property situated in this State, whether by inheritance or testamentary disposition, must be according to our laws. *Ib.*
8. A disposition in favor of a natural child or children, cannot exceed one-fourth of the property of the testator, if he leave a legitimate brother or sister, or one-third, if he leave more remote collateral relations. C. C. 1473. The remainder of his estate must go to his legitimate relations. *Ib.* 1474. *Ib.*

EMANCIPATION OF SLAVES.

A mother, a slave, having been emancipated, her infant child, about eight months old, was suffered to remain with her until the death of her former owner, when the child was sold with the other property of the deceased. The child was then about twelve or thirteen years old. *Held*, that the circumstance of the child's being left with its mother at so tender an age, cannot be considered as evidence of an intention to permit the enjoyment of liberty, within the meaning of art. 3510 of the Civil Code; and that the prescription of ten years established by that article is not applicable to such a case.

Verdun v. Splane, 530.

ERROR.

1. In an action by the plaintiffs, as assignees of a prison-bonds bond, against the surety, parol evidence is admissible to prove a variance between the names of the assignees on the bond and those of the plaintiffs, to be but a clerical error. *Guion v. Ford*, 84.
2. The statement of the title of the case, and of the court from which the appeal is taken, written at the head of the opinions prepared by the Judges of the Supreme Court, is not required by law. It forms no part of the judgment, and when erroneous may be disregarded. *Lovelace v. Taylor*, 92.
3. Plaintiff having sued his lessee levied a provisional seizure on goods belonging to defendants, sub-lessees. The seizure was released on the defendants endorsing a note drawn to their order by plaintiff's tenant, for the amount

of the rent due to him by the latter. To an action on the note defendants pleaded error and want of consideration. *Per Curiam*. After having endorsed the note as a compromise, and prevented the plaintiff from testing his right to seize their goods, defendants cannot be allowed to urge that they owed nothing to the plaintiff or his lessee, and that they are not bound by their endorsement, because it was given to release an unlawful seizure, under the mistaken belief that their goods were liable for the rent due to the plaintiff. C. C. 3045. *Millaudon v. Worsley*, 274.

4. Where there was error on the part of the vendor in delivering, and on the part of the vendee in receiving the possession of property sold, such possession cannot serve as a basis for the prescription of ten years; as where lands resold by a purchaser from the United States, having been erroneously located, the possession in conformity thereto was necessarily erroneous.

Kittridge v. Landry, 477.

See AGENCY, 12. CONTRACTS, 3. EVIDENCE, 23. EXPERTS, 2.

EVIDENCE.

- I. *Onus Probandi*.
- II. *Presumption*.
- III. *Interest of Witness*.
- IV. *Examination of Witness*.
- V. *Commission to take Testimony*.
- VI. *Judicial Records and Proceedings, and Copies thereof*.
- VII. *Non-Judicial Records and other Public Instruments, and Copies thereof*.
- VIII. *Admissibility of Parol Evidence to show Clerical Errors, or to Explain, Alter or Destroy, Written Instruments*.
- IX. *Admissibility of Evidence under the Pleadings*.
- X. *Secondary Evidence*.
- XI. *Evidence of Particular Persons*.
 1. *Parties*.
 2. *Agents*.
- XII. *Evidence in Particular Actions*.
 1. *In Actions for Assault and Battery*.
 2. *In Actions on Bills of Exchange and Promissory Notes*.
 3. *In Suits for Freedom*.
 4. *In Actions on Joint Contracts*.
 5. *In Petitory and Possessory Actions*.
 6. *In Actions for Separation from Bed and Board, and of Property*.
 7. *In Actions for the Settlement of the Community of Gains*.
 8. *In Proceedings Via Executiva*.

I. *Onus Probandi*.

1. Where on an application for a monition under the act of 10th March, 1834, by a purchaser at a Sheriff's sale, for the purpose of confirming his title to the property purchased, it is alleged by the party opposing the homologation of the sale, that the previous advertisements required by law were not made, the *onus probandi* is on the petitioner. They are essential to the validity of the sale, and must be proved when denied. *Ex parte Murray*, 74.
2. Where in an action on a note, defendant claimed credit for a sum proved to have been paid to plaintiff, but the latter alleged that the payment was made in discharge of another debt: *Held*, that it was for the plaintiff to show that he was the holder of another obligation, which had been, or ought to have been credited with the amount. *Mann v. Major*, 475.

II. *Presumption*.

3. The husband being the head and master of the community, all contracts entered into during the marriage, must be considered as made by him, and for his advantage, whether made in his own name, or in the names of both husband and wife. *C. C. 2371, 2372, 2373*. This presumption can only be destroyed by positive proof that the consideration of the contract enured to the separate advantage of the wife. The acknowledgment made by the wife in the instrument itself, cannot avail the creditor.
Prudhomme v. Edens, 64.
4. Where a curator *ad hoc*, is a sworn attorney, he will be presumed to have done his duty. So where a second curator *ad hoc*, has been appointed, *pendente lite*, it will be presumed that the first appointment was vacated, by death or otherwise. *Beaumont v. Covington*, 189.
5. By the common law the assent of creditors will be presumed, in case of an assignment to a trustee for the benefit of all the creditors, where no release or other condition is stipulated by the debtor, and the property is to be distributed among all the creditors *pro rata*. This assent is presumed on the ground, that the trust must be for their benefit.
Fellows v. Commercial and Rail Road Bank of Vicksburg, 246.
6. Where the name of a party forms a part of the commercial name of a partnership against whom a judgment has been obtained, it is, at least, *prima facie* evidence that he was a member of the firm; and a *fi. fa.* levied on his property to satisfy the judgment, will be maintained, unless it be shown that he was not a member. *Mary v. Lampré*, 314.
7. The law raises no presumption of fraud from the fact that the vendor and vendee were brothers-in-law. *Allard v. Allard*, 320.

See *INSOLVENT*, 12.

III. *Interest of Witness*.

8. An objection to a witness on the ground that a suit was pending against him, by the same plaintiff, for other tracts of land. claimed under the same

title, and that he had set up the same defence, goes to his credibility, and not to his competency, he being interested in the question, but not in the case. *Brooks v. Norris*, 175.

9. Objections to a verdict and judgment, on the ground that one of the witnesses was interested, cannot avail a party to the action, who did not appear at the trial, and object to the witness; nor would such an objection support an action of nullity; much less could a mere guardian of property attached in the suit, question, collaterally, the correctness of the decision on such grounds. *Cressap v. Winchester*, 458.

IV. *Examination of Witness.*

10. Where a witness has not been interrogated in the inferior court as to his means of knowing a signature to which he testified, no objection to the want of a disclosure of such means, can avail after appeal.

Berryman v. Dahlgren, 188.

11. Evidence taken in an action against the owners of a steamer, for an injury done to a vessel of plaintiffs by the steamer of the defendants, to which action the captain of the steamer is not a party, is not binding on him.

Davis v. Houren, 255.

V. *Commission to take Testimony.*

12. The deposition of a witness must be reduced to writing by himself, by a magistrate, or by an indifferent person. It is inadmissible, if drawn up in the hand-writing of the party, or of his counsel.

Union Bank of Louisiana v. Lamothe, 5.

VI. *Judicial Records and Proceedings, and Copies thereof.*

13. The *procès-verbal* of the adjudication of property sold by a Court of Probates is evidence of the sale, and no act under the signatures of the parties, is necessary to perfect it. *Faulk v. Pennell*, 26.

14. A copy of a decree of a District Court of the United States sitting in Bankruptcy, certified under the signature of the Clerk, appointing an assignee to the estate of a bankrupt, and ordering him to give security in a certain sum for the faithful discharge of his duties, is sufficient evidence of the authority of the person so appointed to sue as assignee, where the exception does not state the grounds on which plaintiff's capacity is denied. It will not be presumed that the certificate was delivered, before the person so appointed had complied with the orders of the court.

Faures v. Metoyer, 75.

15. The return of the Sheriff on a *feri facias* is not conclusive as to the facts stated by him, and the purchaser cannot be prejudiced by it. Parol evidence is admissible to explain any ambiguity in it, and to show, beyond the contents of the return, that the formalities required by law for the validity of Sheriff's sales had been complied with, and how they were fulfilled.

Succession of Goodrich, 107

16. One claiming under a Sheriff's sale who produces the judgment, execution, and Sheriff's return, showing the adjudication to him, has nothing else to show in support of his title. It is for the opposite party to establish any irregularity or informality in the sale. *Ib.*
17. Where a will executed in another State has been admitted to probate there, by a court of competent jurisdiction, it will be presumed that the formalities required by the laws of that State were complied with, and that the judgment of the court was rendered after due and legal proceedings. No objection that it was not proved according to those laws will be listened to.
Jones v. Hunter, 235.
18. An omission to state, in the certificates appended to an exemplification of a will and of the probate thereof in another State, that the Judge who certifies to the correctness of the copy is *the Presiding Judge*, is immaterial, where it is well known that the Probate Courts of that State are composed of but a single Judge. Act of Congress of 26th May, 1790. *Ib.*
19. An adjudication of succession property made and recorded by a Clerk of a Court of Probates legally appointed, is, of itself, a complete title. *C. C. 2601. Rousseau v. Tête, 471.*
20. Where it is expressly denied that one, who styles himself the Clerk of a Court of Probates, by whom an adjudication of succession property was made, is, or was such, the certificate of the Judge of the court, at the foot of the *procès verbal* of the sale drawn up by such Clerk, in which he styles himself the duly commissioned Clerk of the Court, that the copy is a true one from the original on file in his office, is insufficient to establish his appointment, there being no general law authorizing Probate Judges to appoint Clerks to their courts. *Ib.*
21. Where experts, appointed by the Court, are not shown to have been sworn, and their report does not appear to have been homologated, it may be contradicted by other evidence. *Mooney v. Cage, 494.*

VII. *Non-Judicial Records and other Public Instruments, and Copies thereof.*

22. Cases which would be decided according to the laws of another State if in evidence, must, in the absence of proof of those laws, be governed by our own. *Stone v. Minor, 29.*
23. A patent from the United States for a part of their public lands is conclusive, unless attacked for error or fraud. *Carter v. Monetti, 82.*
24. An admission in a treaty between the United States and a tribe of Indians, as to the limits of the territory occupied by the latter, is only binding on the government, and those claiming under it after the date of the treaty; it is not conclusive on those who had previously acquired rights. The latter may go behind the treaty, and show that the whole proceeding was, as to them, fraudulent and void. *Brooks v. Norris, 175.*
25. A receipt from the Receiver of Public Moneys for the price of lands pur-

chased from the United States, is sufficient evidence of title to enable the purchaser to maintain an action. *Beaumont v. Covington*, 189.

26. The decisions of the Register of the Land Office and Receiver of Public Moneys in Louisiana, in relation to confirmed land claims which may conflict or interfere with each other, under the powers conferred by the sixth section of the act of Congress of 3d March, 1831, are not binding on the parties. The act does not take from the courts the right of investigating and deciding on such claims, after those officers have acted thereon.

Terrell v. Chambers, 243.

VIII. *Admissibility of Parol Evidence to show Clerical Errors, or to Explain, Alter or Destroy, Written Instruments.*

27. In an action by the plaintiffs, as assignees of a prison-bonds bond, against the surety, parol evidence is admissible to prove a variance between the names of the assignees on the bond and those of the plaintiffs, to be but a clerical error. *Guion v. Ford*, 84.

28. The stipulations in a contract of sale, by authentic act, cannot, between the parties or their representatives, be destroyed or weakened by parol evidence. Nothing but a counter-letter can have that effect.

Citizens Bank of Louisiana v. Tucker, 443.

29. Defendant, in answer to an action on his note, averred that plaintiff had received a certain other note to be collected from the endorser thereof, and the proceeds applied to the payment of the note sued on; that he had neglected to protest the note so given, thereby discharging the endorser; and that the amount of this note should be considered as so much paid towards the note sued on. Defendant annexed to his answer plaintiff's receipt, which stated that he had received the note "*à recouvrir contre P. J.*" the endorser. Defendant having offered witnesses to prove that the note received by plaintiff was given in final discharge of the note sued on, the evidence was excluded below, on the ground that it was inconsistent with the receipt annexed to the answer. On appeal: *Held*, that the evidence should have been received. *Mann v. Major*, 475.

See 15 *Supra*.

IX. *Admissibility of Evidence under the Pleadings.*

30. A plea of payment will not authorize evidence of an adverse claim in compensation not equally liquidated with plaintiff's demand. C. C. 2205. C. P. 367. *Maxwell v. Collier*, 86.

X. *Secondary Evidence.*

31. The testimony of a Probate Judge, in whose office a will should have been deposited, that he had seen the will in his office, but had searched for it in vain, cannot authorize the introduction of parol evidence of its contents, and of its having been proved and ordered to be executed, where the minutes of

- the Probate Court are not produced, nor alleged to have been mislaid, lost, or destroyed. Such evidence, though admitted without objection, would be insufficient to establish the will. *Dash v. Dosson*, 11.
32. Recognitive acts do not exempt the party offering them from the necessity of producing the primordial title, unless its tenor be therein specially set forth. *C. C. 2251. Brooks v. Norris*, 175.
33. Recognitive acts are either *ex certa scientia* or *in forma communi*. The former said to be *in forma speciali et dispositiva*, are those in which the primordial title is set forth: they are equivalent to the original title in the event of its loss, and prove its existence against the person making it, dispensing with its production. Recognitive acts *in forma communi*, are those in which the tenor of the primordial title is not set forth, serving only to confirm it so far as it is true, and to interrupt prescription; they do not prove its existence, nor dispense with its production. *Ib.*
33. By the common law, where the recital of a deed points to higher evidence in the power of the party, the withholding of which creates suspicion of fraud or unfairness, the party will be held to account for the non-production of the higher evidence, before the recital can avail him. *Ib.*
34. On an application for a mandamus to compel the erasure of the mortgages existing on property sold by order of a Probate Court, the declaration of the applicant is not the best evidence of the sale; the *procès-verbal* of the sale and adjudication should have been produced.

French v. Prieur, 299.

XI. Evidence of Particular Persons.

1. Parties.

35. Where a party to whom interrogatories have been propounded, states facts not closely connected with those as to which he has been questioned, the opposite party should move to strike out such irrelevant matter.
- Wells v. Hickman*, 1.
36. Where a defendant, after having obtained several continuances, moves for leave to file an amended answer propounding interrogatories to the plaintiff, a resident of another State, evidently merely for delay, permission will be refused. *Yeatman v. Henderson*, 81.
37. Under art. 351 of the Code of Practice, a party to an action to whom interrogatories are propounded can be required to answer, in open court, only when he resides in the parish where the court sits. Where his residence is out of the parish, but within the State, it is the duty of the party propounding the interrogatories to obtain from the court a commission directed to some Judge, or Justice of the Peace, in the parish in which the party interrogated resides, to receive his answers; or the interrogatories, if unanswered, cannot be taken *pro confessis*. *C. P. 352.*
- Crocker v. Turnstall*, 354.
38. Defendant claimed to be the owner of a slave under a notarial act of sale, executed to him on the 26th of March. Plaintiff, cited in warranty as the

representative of the alleged vendor, offered in evidence a letter from the defendant to the latter, dated in that month, the day not mentioned, in which, after stating that he has not title to a sufficient number of negroes to obtain a loan which he desired, he requests the alleged vendor "*to send him an act of sale for the slave*" sued for "*for the present.*" *Held*, that this was a counter-letter, showing that there was no sale as between the parties.

Cox v. Camp, 425.

39. A verbal sale of a slave is good against the vendor, only when acknowledged by him, under oath, in answer to interrogatories, and where there was actual delivery of the slave. C. C. 2255. Where the answer denies the sale, it cannot be contradicted by the evidence of witnesses. *Ib.* 2415. Were it permitted, the prohibition of the law as to testimonial proof of verbal sales of real estate, or slaves, would be evaded, by alleging fraud, and propounding interrogatories, and, when answered in the negative, by offering testimony under the pretence of contradicting the answers.

Haydel v. Betts, 428.

2. Agents.

40. An account rendered by an agent to his principal is conclusive against the former, unless he show clearly errors or omissions to his prejudice.

Mornay v. Bordelais, 318.

XII. In Particular Actions.

1. In Actions for Assault and Battery.

41. In answer to an action for an assault and battery, defendant alleged that plaintiff had been assaulted in consequence of having attempted to excite defendant's slaves to insurrection. Defendant offered to prove that, immediately before the assault, he (defendant) had "said, that he had been told by a person, who had heard it from a slave, that plaintiff was endeavoring to induce defendant's negroes to run away." On objection: *Held*, that the evidence was inadmissible. *Gardiner v. Cross*, 454.
42. In an action for damages, for an assault and battery and slander, evidence as to the plaintiff's character is inadmissible, even in mitigation of damages. *Ib.*

2. In Actions on Bills of Exchange and Promissory Notes.

See *BILLS OF EXCHANGE AND PROMISSORY NOTES*, 7, 15, 19 to 26.

3. In Suits for Freedom.

43. A mother, a slave, having been emancipated, her infant child, about eight months old, was suffered to remain with her until the death of her former owner, when the child was sold with the other property of the deceased. The child was then about twelve or thirteen years old. *Held*, that the circumstance of the child's being left with its mother at so tender an age, cannot be considered as evidence of an intention to permit the enjoyment of liberty, within the meaning of art. 3510 of the Civil Code; and that the pre-

scription of ten years established by that article is not applicable to such a case. *Verdun v. Splane*, 530.

4. *In Actions on Joint Contracts.*

44. Where it is not proved that one of the defendants in an action to enforce a joint obligation, ever entered into it, there must be a judgment as in case of nonsuit. *Bourgerol v. Allard*, 351.

5. *In Petitory and Possessory Actions.*

45. The evidence of a single witness is sufficient to prove permission to a third person to settle upon land belonging to a party.

Metoyer v. Larenandière, 139.

46. Parol evidence is inadmissible to prove that plaintiff was the owner of the land in dispute, and leased it to the defendant, and that the latter committed a fraud in converting it to his possession. It would tend to make out a title to real estate by parol. *Ib.*

6. *In Actions for Separation from Bed and Board, and of Property.*

47. *Prima facie* evidence of the claims of the wife is not sufficient to authorize her to obtain a judgment against her husband, when those claims are to be settled and liquidated contradictorily with the creditors of the husband, or third persons, as to whom the proof must be conclusive. She must show that money alleged to have been received by him, was paid into his hands, or converted to his individual use. *C. C.* 2367.

Oliver v. Her Husband, 36.

48. A reconciliation between a husband and wife, after the facts which might have authorized a suit for separation, is a bar to such an action. *C. C.* 149. Nor can this provision be evaded by praying for a divorce, or a separation *a mensa et thoro*, by way of reconvention. To succeed in such a demand, sufficient legal cause for a separation must be shown to have occurred since the reconciliation. *C. v. E.*, 135.

7. *In Actions for the Settlement of the Community of Gains.*

49. All the effects which the spouses reciprocally possess at the time of the dissolution of the marriage, are presumed to be common effects or gains, unless they satisfactorily prove which of such effects they brought into marriage, or have been given to them separately, or they have respectively inherited. *C. C.* 2374. *Babin v. Nolan*, 508.
50. Proof that a husband received a certain sum during the existence of the community, in payment of a debt due to him individually, is not sufficient to charge the community with the amount, when there is no evidence that the community was benefitted by it, or that it was used in the purchase of community property. *Ib.*

8. *In Proceedings Via Executiva.*

51. The *procès-verbal* of a sale, made by a Parish Judge, by which a mortgage

is retained and duly recorded, is full evidence of the mortgage, except for the issuing of executory process. For this purpose, and to give to the evidence that authenticity required by law, it must be shown, that the *procès-verbal* was signed by the Judge in the presence of two witnesses, and that the note, identified with the mortgage by the *paraph* of the notary, was signed by the party. C. P. 733. *Faulk v. Pinnell*, 26.

EXECUTION.

1. Art. 624, of the Code of Practice, which declares, that one, in whose favor a judgment has been rendered which is subject to appeal, cannot take out execution until ten days shall have elapsed, counting from the notification to the opposite party, must be construed in connection with art. 575, of the same Code, and be understood as excluding Sundays from the ten days. It could not have been intended to allow an execution, so long as the defendant is entitled to a suspensive appeal.
Dayton v. Commercial Bank of Natchez, 17.
2. An injunction against an execution prematurely issued, will not be perpetuated where the creditor will be entitled to take out another execution as soon as the injunction against the first is perpetuated. All that the injured party can expect is, to be relieved from the payment of costs and damages, having had the benefit of all the delay to which he was entitled. *Ib.*
3. Where an execution has been unlawfully issued, every thing done under it, is null and void. *Holmes v. Hemken*, 51.
4. The functions of a District Court in relation to a mandate issued from the Supreme Court to have a judgment executed, are merely ministerial. It cannot render any new judgment which can authorize an appeal, or render one necessary. Its duty is to obey the mandate, and to order the decision of the Supreme Court to be recorded on its minutes, that it may be legally executed. C. P. art. 619. As soon as this is done, the party in whose favor the judgment has been rendered, has an absolute, immediate right to an execution, which cannot be suspended by any subsequent appeal. C. P. 623, 629. *Lovelace v. Taylor*, 92.
5. The possession of a debtor against whom a judgment has been rendered, is divested by the legal seizure under a *fiery facias*, and is vested in the Sheriff until the property is disposed of. He is regarded as the rightful possessor, and can maintain an action of trespass against any person disturbing him in such possession. It is his duty to take the property into actual possession. If it be a plantation, it remains sequestered in his custody until the sale, and he may appoint a keeper or manager; and if resisted in the execution of his orders, may employ force, and summon the *posse comitatus*. C. P. 656 to 662, and 762. *Winn v. Elgee*, 100.
6. The return of the Sheriff on a *fiery facias* is not conclusive as to the facts stated by him, and the purchaser cannot be prejudiced by it. Parol evidence is admissible to explain any ambiguity in it, and to show, beyond the

contents of the return, that the formalities required by law for the validity of Sheriffs' sales had been complied with, and how they were fulfilled.

Succession of Goodrich, 107.

7. Dowry being the effects which the wife brings to the husband to support the expenses of the marriage, (C. C. 2317,) the income from it, though belonging to the husband, is intended to help him to support the charges of the marriage, such as the maintenance of the husband and wife, their children, &c. Ib. 2329. Such income cannot be seized under execution, or made liable to the payment of debts, the object of the law being to secure to the family, under any circumstances, the means of existence. The act of 22d March, 1842, chap. 128, which provides that the Sheriff shall in no case seize the income of dotal property, was merely declaratory of the law previously in force. *Buard v. De Russy*, 111.
8. If the goods of one who has been declared a bankrupt under the act of 1841, be seized in execution and sold, before possession has been taken by the assignee, they may be recovered in an action against the Sheriff, or the plaintiff in execution, if he accompanied the Sheriff, or specially directed the seizure. *Lewis v. Fisk*, 159.
9. A creditor, residing in another state, cannot sue in the Circuit Court of the United States, an executor, curator, or administrator of an estate, in course of administration in a Court of Probates, as an insolvent estate, and obtain judgment, and issue execution thereon in violation of the state laws, and take the property out of the hands of the officer administering it, to the injury of the domestic creditors. But if such executor, administrator, or curator, refuse to admit the justice of a debt claimed by an alien or non-resident, and to class it as an acknowledged debt against the succession to be paid as others, he may be sued in the Circuit Court of the United States, and a judgment liquidating the demand may be obtained; but the judgment must provide that it is to be paid in due course of law, out of the assets in the hands of the executor, &c., to be administered, and no execution can be issued in favor of an alien or non-resident creditor, unless one could be issued, in a similar case, in favor of a domestic creditor.
Lowry v. Erwin, 192.
10. A judgment rendered by a court of the United States, cannot be executed by the seizure and sale of the property of an insolvent succession, under the administration of an executor, curator, or administrator. It can only be satisfied by presenting it to the Court of Probates, under whose direction the succession is being administered, for classification, and payment in due course of administration. *Collier v. Stanbrough*, 230.
11. The privilege of a vendor on the unpaid price of property sold by an agent who has made a *cessio bonorum*, is superior to that acquired by levying a *fi. fa.* on notes given for the price, in the hands of an attorney of the insolvent before his cession. C. C. 3215. C. P. 722.
Caseaux v. His Creditors, 268.
12. A seizure* under a *fi. fa.*, "of any money," which the party in whose

hands the seizure was made, "has now or may hereafter have in virtue of his office of judicial sequestrator," will not, as against other creditors of the debtor whose property was sequestered, embrace any funds not, at the time, in the hands of the sequestrator. *Per Curiam*. A sum of money which may or may not be received, without any specification of amount, even by conjecture or approximation, is a thing too vague to form the object of a seizure. *Murphy v. Thielen*, 288.

13. Where the name of a party forms a part of the commercial name of a partnership against whom a judgment has been obtained, it is, at least, *prima facie* evidence that he was a member of the firm; and a *fi. fa.* levied on his property to satisfy the judgment, will be maintained, unless it be shown that he was not a member. *Mary v. Lampré*, 314.

14. Plaintiff having a judgment against defendants as commercial partners, seized under a *fi. fa.*, a judgment obtained in a court of original jurisdiction by two of the partners against the third in an action for a settlement of the partnership. One of the partners, who had been appointed a receiver in the last suit, having, as receiver, enjoined the *fi. fa.*, deposited a sum of money in court to represent the bond and surety required for the injunction. The judgment seized being reversed on appeal, the injunction was discontinued without objection on the part of the plaintiff, who, under a second *fi. fa.* seized the money deposited in court, and took a rule on the defendants to show cause why it should not be paid to him towards the satisfaction of his execution. *Held*, that the rule should be discharged; that, had a bond been executed, it ought to have been signed by the party as receiver; that the deposit was in lieu of it; that, unless the contrary be shown, it must be presumed that the money deposited was in the party's hands as receiver; that, as such, he was an officer of the court below, in the nature of a judicial sequestrator, and bound to account to it for all the funds coming into his hands; and that the court from which the *fi. fa.* was issued, had no power to withdraw the funds from the control of the court in whose custody they were.

Nelson v. Conner, 339.

15. Where the return on a *fi. fa.* states, that it was levied on the proceeds of the sale of certain slaves seized and advertised to be sold at a future day, at the suit of another party, the plaintiff in the execution will acquire no privilege entitling him to be paid by preference, out of the proceeds. *Per Curiam*. The slaves themselves were not seized, and the proceeds of the sale were not in existence at the time, and could not, therefore, be taken possession of. To entitle a seizing creditor to the privilege conferred by arts. 722, 723 of the Code of Practice, the thing seized must be taken possession of by the officer; otherwise, there is no seizure.

Goubeau v. New Orleans and Nashville Rail Road Company, 345.

16. Defendants, in the absence of plaintiff, seized under a *fi. fa.* against a third person, furniture belonging to the plaintiff, and sold it. The plaintiff's landlord afterwards claimed and received the proceeds, in virtue of his privilege on the furniture for rent. In an action for the value of the furniture against

the Sheriff and the seizing creditors, there was a judgment for the defendants. On appeal: *Held*, that the court below erred; that it is no excuse for the defendants, if their acts were illegal and caused damage to the plaintiff, that they gained nothing by them, and that another got the money they were endeavoring to obtain; that the course pursued by the defendants compelled the landlord to assert his claim, and that it is not shown that he would, in the absence of the plaintiff, have taken any step to have the furniture sold. Case remanded. *Lawrence v. Hozey*, 385.

See SALE, VII.

EXECUTORY PROCESS.

1. The *procès-verbal* of a sale, made by a Parish Judge, by which a mortgage is retained and duly recorded, is full evidence of the mortgage, except for the issuing of executory process. For this purpose, and to give to the evidence that authenticity required by law, it must be shown, that the *procès-verbal* was signed by the Judge in the presence of two witnesses, and that the note, identified with the mortgage by the *paraph* of the notary, was signed by the party. C. P. 733. *Faulk v. Pinnell*, 26.
2. The holder of a note secured by mortgage, signed by one since deceased, cannot obtain an order of seizure and sale. He is only entitled to a judgment to be paid *in concurso*, according to his rank relatively to the other creditors, and in the due course of administration. *Erwin v. Lowry*, 28.
3. A judgment rendered against one in another State, in an action in which the defendant, after having pleaded, withdrew his plea, is not a judgment by default, in the meaning of art. 747, of the Code of Practice, and an order of seizure and sale may be issued thereon. A judgment by default, according to the laws of this State, takes place only where the defendant has neither appeared, nor answered. *Stone v. Minor*, 29.
4. The clause *de non alienando* in an act of mortgage, relieves the mortgagee from the necessity of pursuing all the steps required in an hypothecary action in ordinary cases. *Dodd v. Crain*, 58.
5. On an appeal from an order of seizure and sale, the only question is, whether the Judge had sufficient evidence before him to authorize his *fiat*. Such an order cannot be set aside on account of subsequent irregularities in the execution of it, as not notifying the proper parties, &c. Redress must be sought by other proceedings. *Ib.*
6. Judgments in this State upon those rendered in other States, must render them executory according to their tenor, whether *via executiva*, or by decreeing their execution in an ordinary action. *Maxwell v. Collier*, 86.
7. Executory process by seizure and sale, is a summary and severe remedy, and the formalities prescribed by law must be strictly complied with, or the property will not be transferred, and the purchaser acquire no title.

Lowry v. Erwin, 192.

8. To support a sale by a Sheriff or Marshal, under an order of seizure and sale, there must be a valid judgment, by a court of competent jurisdiction; otherwise the title will not be divested. Where there is a total want of jurisdiction, the proceedings are null and void; and the competency of the tribunal may be inquired into. *Ib.*
9. An order of seizure and sale cannot be obtained either from a state court, or a court of the United States, against mortgaged property composing part of a succession represented by an executor, administrator, or curator, and in the course of administration in a Court of Probates. *Ib.*
10. Until the notice required by art. 735 of the Code of Practice to be given to a debtor, on an application for an order of seizure and sale against mortgaged property, has been given, and the time has elapsed, the order directing the seizure is not a final judgment, and no executory proceedings can be had under it. *Ib.*
11. A judgment rendered by a court of the United States, cannot be executed by the seizure and sale of the property of an insolvent succession, under the administration of an executor, curator, or administrator. It can only be satisfied by presenting it to the Court of Probates, under whose direction the succession is being administered, for classification, and payment in due course of administration. Nor can a court of the United States issue an order of seizure and sale, (executory process,) against property belonging to such a succession. It wants jurisdiction, *ratione materiae*. Such jurisdiction belongs exclusively to the Court of Probates.
Collier v. Stanbrough, §30.
12. A third possessor, personally liable for the debt, is not entitled to the exceptions which one not so bound, might oppose to the creditor's hypothecary action, and cannot relinquish the property mortgaged. *C. C. 3366, 3368. Twichel v. Andry, 407.*
13. Though but one instalment of a debt secured by a mortgage by authentic act, be due, an order of seizure and sale may be obtained for the whole amount of the debt, but the sale must be on terms of credit corresponding with the periods at which the remaining instalments fall due.

Robinson v. Aubert, 461.

EXPERTS.

1. Where experts, appointed by the Court, are not shown to have been sworn, and their report does not appear to have been homologated, it may be contradicted by other evidence. *Mooney v. Cage, 494.*
2. A court, by which experts have been appointed, is not bound to adopt their report. Any error in it may be corrected; another report may be ordered; or, rejecting the report altogether, the court may adopt any conclusion which the evidence, adduced contradictorily by the parties before the experts, or before the court, may warrant and justice require. *C. P. 442, 451, 458, 461. Babin v. Nolan, 508.*

FIERI FACIAS.

See EXECUTION. SALE, VII.

FOREIGN LAWS.

1. Cases which would be decided according to the laws of another State, if in evidence, must, in the absence of proof of those laws, be governed by our own. *Stone v. Minor*, 29.—*Allen v. Allen*, 104.
2. Questions which concern our own citizens, although growing out of the constitutional or legislative provisions of another State, will be regarded as new ones, where there is a conflict between the tribunals of the State and of the United States as to their proper construction.

Cotton v. Brian, 115.

FRAUD.

See CONTRACTS, 3. EVIDENCE, 7, 23. INSOLVENCY, 9.

HOLY THINGS.

See SACRED THINGS.

HUSBAND AND WIFE.

- I. *Laws regulating Rights of Husband and Wife.*
- II. *Dotal and Paraphernal Property, and of the Wife's Mortgage and Privilege.*
- III. *Community of Gains.*
- IV. *Contracts of the Wife.*
- V. *Authorization to Sue or be Sued, and Citation of Married Woman.*
- VI. *Separation of Property.*
- VII. *Separation from Bed and Board, and Divorce.*

I. *Laws regulating Rights of Husband and Wife.*

1. The rights of married persons are not to be regulated by the laws of the State in which the marriage is celebrated, when it appears that it was their intention to remove immediately, and fix their residence in another country.

Allen v. Allen, 104.

II. *Dotal and Paraphernal Property, and of the Wife's Mortgage and Privilege.*

2. The paraphernal property of a married woman is presumed by law to be

- under the management of her husband, unless administered by her separately and alone. C. C. 2361, 2362. *Pinckney v. Mulhollan*, 41.
3. The property which a wife inherits during marriage, is, according to the laws of this State, separate and paraphernal. *Allen v. Allen*, 104.
 4. Dowry being the effects which the wife brings to the husband to support the expenses of the marriage, (C. C. 2317,) the income from it, though belonging to the husband, is intended to help him to support the charges of the marriage, such as the maintenance of the husband and wife, their children, &c. *Ib.* 2329. Such income cannot be seized under execution, or made liable to the payment of debts, the object of the law being to secure to the family, under any circumstances, the means of existence. The act of 22d March, 1842, chap. 128, which provides that the Sheriff shall in no case seize the income of dotal property, was merely declaratory of the law previously in force. *Buard v. De Russy*, 111.
 5. The words "*or otherwise disposed of the same*," in art. 2367, of the Civil Code, apply not to the price of the paraphernal property sold by the wife, but to the property itself, or its value, when, in any other case than that of a sale by the wife, the husband has disposed of it for his individual interest. The legal mortgage given to the wife, by that article, on all the property of her husband for the reimbursement of the value of her paraphernal property, is not confined to the case of the sale of the property, but extends to all cases where the husband receives money for his wife or disposes of her property in any way for his individual benefit, and it attaches from the moment of such receipt or conversion. *Compton v. Her Husband*, 170.
 6. Though the wife has a right to administer personally her paraphernal property, without the authorization of her husband, and, even where she has left its administration to him, may resume it at any time, yet if, during his administration, he has sold any part of it, she has, under art. 2367, a mortgage on his property for its value. *Ib.*

III. *Community of Gains.*

7. The husband being the head and master of the community, all contracts entered into during the marriage, must be considered as made by him, and for his advantage, whether made in his own name, or in the names of both husband and wife. C. C. 2371, 2372, 2373. This presumption can only be destroyed by positive proof that the consideration of the contract enured to the separate advantage of the wife. The acknowledgment made by the wife in the instrument itself, cannot avail the creditor.
Prudhomme v. Edens, 64.
8. A surviving wife who has omitted to cause an inventory to be made of the effects left by her husband, however inconsiderable, in the manner prescribed for beneficiary heirs, cannot renounce the community. It is not enough that she present a petition to the Probate Court, praying that an inventory may be made; she must see that it is done. C. C. 2379, 2380, 2381, 2382. She is bound to point out to the Judge all the effects of the community, the

- concealment or making away with any part of which, will render her incapable of renouncing. *Ib.* 2387. *Chapman v. Kimball*, 94.
9. All the effects which the spouses reciprocally possess at the time of the dissolution of the marriage, are presumed to be common effects or gains unless they satisfactorily prove which of such effects they brought into marriage, or have been given to them separately, or they have respectively inherited. *C. C.* 2374. *Babin v. Nolan*, 508.
 10. To ascertain, after the dissolution of a matrimonial community, the increase or improvements in the value of the hereditary property of either of the spouses, during the marriage, from the common labor or expense, the proper course is, to estimate the value of the property at the time of the dissolution of the community, in the situation in which it was at the date of the marriage, and its real value, with all the improvements existing thereon, at the time of such dissolution; and the difference between the two estimates will form the increased or improved value, to one-half of which the other spouse will be entitled, on the settlement of the community. *C. C.* 2377. *Ib.*
 11. Proof that a husband received a certain sum during the existence of the community, in payment of a debt due to him individually, is not sufficient to charge the community with the amount, where there is no evidence that the community was benefitted by it, or that it was used in the purchase of community property. *Ib.*
 12. A crop, made after the dissolution of the community, by the husband, on land belonging to him, partly with his own slaves, and partly with those of the community, cannot be considered as belonging to the community, nor be included in its settlement before the Probate Court. The husband is bound to account to the heir for the value or proceeds of the labor of the slaves, having acted as his *negotiorum gestor* in the administration of his property; but this has nothing to do with the settlement of the community. The action of the heir, must be brought before the ordinary tribunals. *Ib.*

IV. *Contracts of the Wife.*

13. Where an endorser, the wife of the maker of a note, could not sue the latter, her endorsee cannot. *Doll v. Theurer*, 276.
14. A husband can contract with his wife only in the cases specially authorized by law. *Ib.*
15. Where a wife is a public merchant carrying on a separate trade, she is in no way under the control of her husband so far as her trade is concerned, and needs no authorization from him to do any act in relation to it. *C. C.* 128. And where she occupies as a sub-tenant part of a building leased by the husband, the owner of the building will acquire, by operation of law, on her separate property contained in the shop occupied by her, a right of pledge for the payment of his rent, to the full extent of her debt to the principal lessee. *C. C.* 2675, 2676, 2677. *Deslix v. Jone*, 292.

See **CONTRACTS**, 12.

V. *Authorization to Sue or be Sued, and Citation of a Married Woman.*

16. A single citation is sufficient where the defendants, sued as tutrix and co-tutor of certain minors, are husband and wife. C. P. 182. And when not separated from bed and board, its service on either will be good. Ib. 192.
Gaines v. Morris, 4.
17. A married woman, not separated from bed and board, cannot sue or be sued, without the authorization of her husband, or that of the Judge before whom the suit is brought. Nor can she appeal from a judgment rendered against her, without having been so authorized.
Cuny v. Dudley, 177.
18. The omission of a plaintiff in an action against a married woman, to cause her to be authorized, either by her husband or the court, to defend the suit, rendering the proceedings absolutely null, will be noticed by the court, though it escape the attention of the parties. In such a case the judgment may be reversed, and the case remanded to enable the plaintiff to have the opposite party legally authorized to defend the action.
Robinson v. Butler, 78.
19. The insolvency of a husband, who has made a surrender of his property, does not deprive him of his marital power of appearing in court to assist his wife, nor prevent his being made a defendant for that purpose. C. P. 118.
Twichel v. Andry, 407.

VI. *Separation of Property.*

20. *Prima facie* evidence of the claims of the wife is not sufficient to authorize her to obtain a judgment against her husband, when those claims are to be settled and liquidated contradictorily with the creditors of the husband, or third persons, as to whom the proof must be conclusive. She must show that money alleged to have been received by him, was paid into his hands, or converted to his individual use. C. C. 2367.
Oliver v. Her Husband, 36.
21. Any creditor of the husband who alleges, that he has been aggrieved by a judgment for a separation of property between the spouses, may appeal therefrom, though not a party to the suit in the lower court. C. P. 571. C. C. 2408. Compton v. Her Husband, 170.
22. A wife may obtain a separation of property, though she brought no dowry in marriage, and have no actual rights or claims against her husband, which can be endangered by the disorder of his affairs, where the habits or circumstances of her husband render it necessary to preserve for her family the earnings she may afterwards derive from her industry or talents. Her right to a separation is not limited to the cases mentioned in art. 2399 of the Civil Code. Davock v. Darcy, 342.
23. A judgment for a separation of property between a husband and wife, is retroactive as far back as the day on which the petition was filed. C. C.

2406. The community of *acquêts* is dissolved from that time ; and purchases made by the wife between the date of the demand and that of the judgment of separation, must be viewed as made on her own account.

Dugas v. Her Husband, 527.

VII. *Separation from Bed and Board, and Divorce.*

24. A reconciliation between a husband and wife, after the facts which might have authorized a suit for separation, is a bar to such an action. C. C. 149. Nor can this provision be evaded by praying for a divorce, or a separation *a mensa et thoro*, by way of reconvention. To succeed in such a demand, sufficient legal cause for a separation must be shown to have occurred since the reconciliation. C. v. E., 135.

25. A wife, proved to have been guilty of adultery, cannot claim, on her part, a divorce from her husband, on account of his having killed the man with whom the act was committed. The provision of the act of 2d April, 1832, sect. 1, which declares "that whenever a husband or wife charged with an infamous offence, shall actually have fled from justice and gone beyond the jurisdiction of the State, the husband or wife of such fugitive may claim a divorce, on producing proof to the Judge who tries the petition for divorce, that his or her husband or wife has actually been guilty of such infamous offence, and has so fled from justice," never contemplated such a case. *Ib.*

26. A husband who obtained a divorce on account of adultery on the part of his wife, entrusted with the custody of the issue of the marriage. *Ib.*

IMMOVEABLES.

See MOVEABLES.

INDIAN TRIBES.

The Spanish government never acknowledged any primitive title in the Indian tribes to lands on this continent. Brooks v. Norris, 175.

See CADDO INDIANS.

INJUNCTION.

1. Where defendant is in possession of a judgment for a certain sum, payable in specie, from which no appeal has been taken, an allegation by the party against whom it was rendered, that, by the original contract, he was entitled to discharge the debt in the notes of a particular bank, cannot be inquired into on an application to enjoin the execution. Such a defence should have been urged in the original suit in which the judgment was rendered, under which the execution was issued.

Dayton v. Commercial Bank of Natchez, 17.

2. An injunction against an execution, prematurely issued, will not be perpetuated where the creditor will be entitled to take out another execution as soon as the injunction against the first is perpetuated. All that the injured party can expect is, to be relieved from the payment of costs and damages, having had the benefit of all the delay to which he was entitled. *Ib.*
3. Any error committed by a Justice of the Peace, in proceedings on an application for the removal of a tenant under the act of 3d March, 1819, relative to landlord and tenant, can only be corrected by an appeal to the Parish Court, or by an action of nullity. In case of the refusal of the Justice to allow an appeal, the remedy is by mandamus. An injunction will not lie from a District Court, to stay the proceedings under such a judgment of removal.
McLean v. Carroll, 43.
4. It is not necessary that a Parish Judge, in granting an injunction in the absence of the District Judge, should direct in his order into what court it is to be made returnable. It is the duty of the clerk to issue the writ according to law. *Hagan v. Hart, 427.*
5. Though the Code of Practice (arts. 395, 397, 617, 629,) provides that the execution of a judgment belongs to the court which rendered it, and that an opposition, by which a third person pretends to be the owner of the thing seized, must be made before the court which gave the judgment, or issued the order of seizure; yet, where a plaintiff sets up title in himself to a slave, shown to be worth more than three hundred dollars, and bases his injunction, or opposition, on his right of ownership, a question is presented which no Parish Court, except that of the parish of Orleans, can try, the jurisdiction of such courts being limited, (C. P. 128,) and no provision having been made for an appeal from their decisions to the Supreme Court. Such a case is, *ex necessitate rei*, an exception to the rules laid down for ordinary cases. Art. 397 must be considered as only applicable to those cases in which the value of the property seized is within the jurisdiction of the court issuing the execution; in other cases the opposition, or injunction, which the Code of Practice, (art. 398,) considers a separate demand, even when brought before the court which granted the order of seizure, must be taken into a court having jurisdiction co-extensive with the right claimed. *Ib.*
6. An order of seizure and sale, having been issued against two joint purchasers of a tract of land, for the amounts then respectively due by them, one of the vendees alone applied for an injunction, praying for a rescission of the sale, &c. An injunction was issued, arresting the proceedings as to both vendees. The injunction being subsequently dissolved: *Held*, that damages under the act of 25th March, 1831, § 3, could be allowed only on the amount due by the vendee, who had enjoined the proceedings; and that the act of 1831, being one of great severity, should be strictly construed.
Gorham v. Hayden, 450.
7. If execution be issued after a suspensive appeal, the Judge of the inferior court may grant an injunction to prevent a sale. *Per Curiam.* This is

not to interfere with the judgment appealed from, but to insure to the appellant the benefit of his appeal. *Aubert v. Robinson*, 463.

INSOLVENCY.

- I. *Of the Fact of Insolvency.*
- II. *Effect of a Surrender on Rights of Insolvent.*
- III. *Of the Syndics.*
- IV. *Contracts of Insolvent Fraudulent or Void as to Creditors.*
- V. *Sale of Property of Insolvent.*
- VI. *Privileges of Creditors and Tableau of Distribution.*

I. *Of the Fact of Insolvency.*

1. A bank will not be considered as insolvent, merely because it has gone voluntarily, or been forced into liquidation under the act of 14th March, 1842, relative to the liquidation of banks. The provisions of the act do not authorize such a presumption, nor contemplate the insolvency of the Bank as a cause for the forfeiture of its charter; the charter may be forfeited by a violation of its provisions, without the Bank being insolvent. *Commissioners of the Exchange and Banking Company of New Orleans v. Mudge*, 387.
2. It is only when the whole amount of the capital stock of a bank, together with its assets, is insufficient to meet its liabilities, that it can be said to be insolvent. *Ib.*
3. No law of this State in existence before 1842 defined the insolvency of a corporation, or provided for its voluntary or forced liquidation. The acts of the 14th, and 26th March, 1842, and 5th April, 1843, apply alike to solvent and insolvent banks, and whether their liquidation be forced or voluntary. They are special laws, for special purposes, and are to be construed together, as *in pari materia*. To them alone, we must look for the mode of proceeding, and for the powers and duties of the commissioners of liquidation. The Legislature intended by these acts to provide specially for the holders of the notes of the banks in the course of liquidation, and to make the circulation of each bank a good offset to debts due to it. These statutes make it the duty of the commissioners to allow such offsets, and they violate no vested right, nor impair the obligation of any contract.

Ib.—Rehearing, 397.

II. *Effect of a Surrender on Rights of Insolvent.*

4. The insolvency of a husband, who has made a surrender of his property, does not deprive him of his marital power of appearing in court to assist his wife, nor prevent his being made a defendant for that purpose. *C. P.* 118. *Twichel v. Andry*, 407.

III. *Of the Syndics.*

Where the syndics of the creditors of an insolvent have failed to furnish

the bond required by law, a creditor may take a rule on them to show cause why another meeting of the creditors should not take place, to appoint other syndics in their place ; and the rule will be made absolute, in the absence of proof of a compliance with their obligation to furnish a bond. The creditor was under no obligation to take a rule on them to show cause why they should not give bond. *Talhard v. His Creditors*, 317.

6. Oppositions having been filed to the homologation of a *tableau* of distribution presented by the syndic of an insolvent, praying for the cancelling of the sales made by the syndic, that the property be disposed of again for the benefit of all the creditors, and the *tableau* set aside, the opponents subsequently filed other oppositions by way of amendment, in which, abandoning the objects of the first oppositions, and waiving their purpose of disturbing the sales and resisting the homologation of the *tableau*, they pray that the syndic may be condemned, personally, to pay them the amounts for which they were placed on the *tableau* as creditors of the insolvent, on the ground of his having acted without any regular appointment, having sold the property illegally, and for his neglect and waste of the property : *Held*, that the demands in the original and amended oppositions are inconsistent, the one precluding the other, and cannot be cumulated in the same action, (C. P. 149 ;) that the demands in the original oppositions must be considered as abandoned by the supplemental oppositions ; and that any claim for damages against the syndic, personally, for malfeasance, should be brought against him individually, and not by way of opposition to a *tableau* of distribution. *Blake v. His Creditors*, 530.

IV. *Contracts of Insolvent Fraudulent or Void as to Creditors.*

7. It is essential to a revocatory action in which an act of an insolvent is attacked, as having been made in fraud and to the injury of his creditors, that fraud should be alleged against the debtor, who must be a party to the suit.
Lawrence v. Bowman, 21.
8. No contract between a debtor and one of his creditors, for the purpose of securing a just debt, though the debtor were insolvent to the knowledge of the creditor, and although the other creditors be injured thereby, can be annulled after one year, reckoning from its date to the time of bringing the suit to avoid it. C. C. 1982. *Hill v. Barlow*, 142.
9. The action allowed by the tenth and eleventh sections of the act of 28th March, 1840, abolishing imprisonment for debt, cannot be maintained, unless the unjust advantage, or preference, given by the creditor to one of his debtors, or the conveyance, transfer, mortgage, or pledge of his property made by him, shall have had the effect of injuring the complainant. Thus, where the property alleged to have been fraudulently and illegally sold, had been seized under a *fi. fa.* by a third person, who had, under art. 722 of the Code of Practice, by the mere act of seizure, acquired a preference over the other creditors, the plaintiff cannot maintain his action ; as the annulling of the sale could only benefit the creditor who had acquired a privilege by his seizure. *Lott v. Gray*, 152.

10. By the common law a debtor may make a valid assignment for the benefit of his creditors, and may even give preferences to a certain class of them, and it is no objection to such an assignment, that it defeats the legal remedies of all other creditors, though a majority in number and value, unless there be some provision of a bankrupt law to invalidate the deed. But the assignment must be absolute and unconditional, the assignor neither retaining power to change the trustees, nor a control over the deed of trust.

Fellows v. Commercial and Rail Road Bank of Vicksburg, 246.

11. By the common law the assent of creditors will be presumed, in case of an assignment to a trustee for the benefit of all the creditors, where no release or other condition is stipulated by the debtor, and the property is to be distributed among all the creditors *pro rata*. This assent is presumed on the ground, that the trust must be for their benefit. *Ib*.
12. The defendants, a corporation created by another State, in which the common law prevails, for the purpose of banking and constructing a railway, made an assignment of all their property to certain trustees. By the deed of assignment, among other things, it is declared, that the trustees shall be the joint agents of the corporation and of such of the creditors as may become parties thereto; that they shall render semi-annual accounts to the assignors; that the latter retain the right of substituting a new trustee in case of vacancy; and that the trustees shall borrow a sum of money for the completion of the railway within the time prescribed by the charter, for the purpose of saving the property and the charter from forfeiture, the amount to be repaid by preference, out of the effects assigned, and its repayment secured by a lien on the real estate of the corporation; the deed reciting the inability of the corporation from the pressure of its debts, to raise the means of completing the road, as the principal cause for making the assignment. There was no schedule of the creditors, nor specification of the property intended to be conveyed. The Directors reserved the right of controlling the trustees in relation to claims against the corporation of a doubtful character. In an action by plaintiffs, creditors of the corporation, who had never expressly assented to the assignment, commenced by attachment of a debt due to the corporation in this state: *Held*, that many of the stipulations in the deed are inconsistent with the idea of a *bona fide* assignment by which the legal title of the property of the debtors is to be vested in trustees for the benefit of the creditors; that it is rather the creation of an agency to manage the affairs of the corporation, under the supervision of the Directors, for the purpose of completing the road; that it is not such an assignment as would be valid by the common law; and that the assent of the plaintiffs, as a part of the creditors, cannot be presumed. Attachment maintained. *Ib*.

V. Sale of Property of Insolvent.

13. If the holder of a note secured by mortgage, appears at the meeting of the

creditors of an insolvent, and votes for a sale of the mortgaged property on terms of credit, he will thereby release the endorser.

M'Guire v. Wooldridge, 47.

VI. Privileges of Creditors and Tableau of Distribution.

14. The privilege on the price of the property sold, where the price has not been paid by the purchaser, nor passed into an account current between him and the insolvent, granted to the consignor by art. 3215 of the Civil Code, in the event of the insolvency of the consignee, will not be affected by the fact that the property was sold with other property of the same kind, and one note taken for the price of both, where the bill of sale shows the price of each parcel, and the amount collected by the syndic can be apportioned accordingly. *Caseaux v. His Creditors*, 268.
15. Where in the settlement of the estate surrendered by an insolvent, the proceeds of the moveables are insufficient to pay the privileged charges, the property on which liens or mortgages exist, and not the creditors holding such liens and mortgages, must contribute to their payment. *Ib.*
16. The privilege of a vendor on the unpaid price of property sold by an agent who has made a *cessio bonorum*, is superior to that acquired by levying a *fi. fa.* on notes given for the price, in the hands of an attorney of the insolvent before his cession. *C. C. 3215. C. P. 722. Ib.*
17. Where a mortgage creditor of an insolvent who has made a cession of his property appeals from a judgment, allowing the sums claimed by certain law officers for their fees, the latter must be made parties to the appeal. It is not enough that the syndic, who has no interest in a contest between privileged creditors as to their relative rank, should be cited.

Cassidy v. His Creditors, 303.

18. The appellant, a partner of the insolvent in a saw mill, was to manage the business, taking charge of the receipts and disbursements, and to be entitled to a certain portion of the profits after all expenses were deducted. The insolvent was to furnish the land, buildings, laborers, and necessary capital for the purchase of materials. The appellant claims, under art. 2157, § 1, 3, of the Civil Code, to be subrogated to the rights of certain mechanics and laborers employed on the mill whose claims had been paid by him. *Held*, that there was no subrogation; that the debts were paid by the appellant in the course of his administration of the partnership business; and that, as to the insolvent, any advances made by the appellant could give him only the privilege of a partner on the partnership property, entitling him to be paid out of its proceeds in preference to any individual creditor of the insolvent.

Gordon v. His Creditors, 328.

See 6 *Supra*.

INTEREST.

1. On a plea of usury by the maker or accommodation endorser of a note, the holder will be entitled to recover only the amount actually paid by him.
Satterfield v. Compton, 120.
2. The holder of a promissory note, protested for non-payment, is entitled to interest on the amount due from the day of protest. Act 14th February, 1821, sect. 2. Mason v. Alexander, 166.
3. The maker of a note given for the price of a tract of land, is bound, under art. 2531, of the Civil Code, to pay legal interest on the amount from the time when it became due, till payment. Ib.
4. Where a creditor whose debt is actually due, gives time to his debtor, taking a note payable at a future period, but stipulating that on failure by the latter to pay at the maturity of the note, he shall pay the highest conventional interest from the date of the note till paid, the agreement is legal. In such a case the creditor will be presumed to have remitted the interest he had a right to exact for the credit allowed, and the debtor, on failing to take up the note at maturity, will only pay the conventional interest allowed by law. Otherwise, where such a stipulation is contained in a note given for the price of property sold on a credit. In this case it must be presumed that the price was proportioned to the length of credit, and paid not only for the property, but for its use from the sale to the stipulated time of payment, and that any penalty or damages agreed on, though in the form of interest, must have been for the purchaser's default or delay in paying, which is usurious and illegal. To enforce such an agreement, would be to compel the purchaser to pay the amount of the interest between the date and maturity of the note, in addition to the highest conventional interest from the latter period, thus condemning him to pay as a penalty, or as damages for the inexecution of an obligation to pay money, more than the highest rate of conventional interest, which, whatever be the shape of the contract, the law forbids. C. C. 1925, 2895. Griffin v. His Creditors, 216.
5. Where the object of a contract is anything but the payment of money, the parties may determine the sum that shall be paid as damages for its breach, and the courts will lend their aid to carry the agreement into effect. C. C. 1928. *Aliter*, where the contract is to pay a sum of money. In such a case, no damages exceeding the highest rate of interest allowed by law, can be stipulated. The damages due for delay in the performance of an obligation to pay money, are called interest. The creditor is entitled to such damages, without proving any loss; and he can recover no more, no matter what loss he may have sustained. C. C. 1929. Ib.
6. On the sale of land, it was stipulated that the price should be paid in instalments at future periods, but the act was silent as to interest. In an action for the price, with interest from the day of sale: *Held*, that the pro-

perty producing fruits, the vendor is entitled to interest, but only from the maturity of the instalments. C. C. 2531. *Daigle v. Bruzzé*, 418.

See NEW ORLEANS, 3.

INTERPRETATION.

1. The legislative authority has no power to fix, by a declaratory act, or otherwise, a construction of the constitution of the State, which shall be binding on the judicial department. If the courts occasionally rely upon legislative construction of acts of ordinary legislation, it is because, as to them, the Legislature has a right to repeal, or modify them, or to settle their construction in cases of ambiguity, by a declaratory act. *Cotton v. Brien*, 115.
2. Every law empowering our courts to decide upon the rights of absentees must be strictly construed, and the formalities prescribed exactly followed. *Hill v. Barlow*, 142.
3. A law should never be considered as applicable to cases which arose previous to its enactment, unless the Legislature have, in express terms, declared such to be their intention. *Succession of Oyon*, 504.

See INSOLVENCY, 3.

JUDGMENT.

1. Judgments in this State upon those rendered in other States, must render them executory according to their tenor, whether *via executiva*, or by decreeing their execution in an ordinary action. *Maxwell v. Collier*, 86.
2. The statement of the title of the case, and of the court from which the appeal is taken, written at the head of the opinions prepared by the Judges of the Supreme Court, is not required by law. It forms no part of the judgment, and when erroneous may be disregarded. *Lovelace v. Taylor*, 92.
3. No state court can inquire into any act or judgment of a court of the United States, upon the merits, nor say whether the judgment was rendered upon proper evidence, or is correct; but when the proceedings of a court of the United States are set up as the basis of title, between persons litigating in our own courts, they may be looked into to ascertain whether the court had authority to render such a judgment, whether there is in fact such a judgment, or to ascertain whether the executory proceedings under it were legal. *Lowry v. Erwin*, 102.
4. To support a sale by a Sheriff or Marshal, under an execution or order of seizure and sale, there must be a valid judgment, by a court of competent jurisdiction; otherwise the title will not be divested. Where there is a total want of jurisdiction, the proceedings are null and void; and the competency of the tribunal may be inquired into. *Ib.*
5. A judgment by a court having no jurisdiction or authority to render it, is null and void; and one possessing under it, is not a possessor under a just

- title and in good faith, so as to exempt him from liability for the fruits and revenues, until claimed by the owner. To exempt him, as a possessor in good faith, from such liability, the possession must have been valid in point of form. C. C. 3452. *Ib.*
6. The rule *stare decisis* is entitled to great weight and respect, where there has been on any point of law a series of adjudications, all to the same effect ; but a single decision, believed to have been unadvisedly or erroneously made, will be overruled. *Griffin v. His Creditors—Rehearing*, 225.
 7. Where a will executed in another State has been admitted to probate there, by a court of competent jurisdiction, it will be presumed that the formalities required by the laws of that State were complied with, and that the judgment of the court was rendered after due and legal proceedings. No objection that it was not proved according to those laws will be listened to.
Jones v. Hunter, 235.
 8. A rule supported by affidavit, taken on a Judge of a Court of Probates, to show cause why a mandamus should not be issued to compel him to pronounce a judgment on a case which had been submitted for decision more than twelve months previously, will be made absolute where no cause is shown by the Judge. *State v. Judge of Probates of St. James*, 272.
 9. Objections to a verdict and judgment, on the ground that a juror and one of the witnesses were interested, cannot avail a party to the action, who did not appear at the trial, and challenge the juror or object to the witness ; nor would such objections support an action of nullity ; much less could a mere guardian of property attached in the suit, question, collaterally, the correctness of the decision, on such grounds. *Cressap v. Winchester*, 458.
 10. Service of notice of judgment on a defendant at his last place of residence in the parish in which the judgment was obtained, is sufficient, although he may have afterwards resided in another parish in the State. *Ib.*
 11. Plaintiff moved to dismiss his action, at his costs, and an order was made accordingly, but before the order of dismissal was signed, it was set aside on his own motion, without notice to defendant. A judgment by default was subsequently taken, and confirmed against the defendant. On appeal by the latter : *Held*, that after dismissing his action, plaintiff could not have the order of dismissal set aside, and the case re-instated without notice to defendant. *Michel v. Blackman*, 465.

JUDGMENT BY DEFAULT.

A judgment rendered against one in another State, in an action in which the defendant, after having pleaded, withdrew his plea, is not a judgment by default in the meaning of art. 747, of the Code of Practice, and an order of seizure and sale may be issued thereon. A judgment by default, according to the laws of this State, takes place only where the defendant has neither appeared, nor answered. *Stone v. Minor*, 29.

See PLEADING, 21.

JURY.

1. Damages can be assessed only by a jury; and in suits before the District Court of the First District, or the Parish, or Commercial Courts of New Orleans, the plaintiff must advance the compensation allowed to the jurors by the 17th sect. of the act of 10th February, 1841, where the defendant has not done so. C. P. 313.

Liles v. New Orleans Canal and Banking Company, 273.

2. The provision of the 17th sect. of the act of 10 February, 1841, which declares that the cases then pending before the District Court of the First District, and the Parish and Commercial Courts of New Orleans, "shall be stricken from the jury docket, unless the compensation fixed by that act to be allowed to jurors, be advanced by the party demanding a trial by jury," is not unconstitutional. *Per Curiam*. Under the twentieth section of the sixth article of the State Constitution no acquired rights, or existing contracts can be affected by subsequent legislation; but it is otherwise as to remedies and forms of proceeding. Whatever relates to the manner of conducting and trying a suit, (*litis ordinatio*,) is always within the control of the Legislature, which can, at any time, make any change, or modification it may think conducive to the public good and the proper administration of justice. Baldwin v. Bennett, 309.
3. Objections to a verdict and judgment, on the ground that a juror and one of the witnesses were interested, cannot avail a party to the action, who did not appear at the trial, and challenge the juror or object to the witness; nor would such objections support an action of nullity; much less could a mere guardian of property attached in the suit, question, collaterally, the correctness of the decision, on such grounds.

Cressap v. Winchester, 458.

JUSTICE OF THE PEACE.

Any error committed by a Justice of the Peace, in proceedings on an application for the removal of a tenant under the act of 3 March, 1819, relative to landlord and tenant, can only be corrected by an appeal to the Parish Court, or by an action of nullity. In case of the refusal of the Justice to allow an appeal, the remedy is by mandamus. An injunction will not lie from a District Court, to stay the proceedings under such a judgment of removal.

McLean v. Carroll, 43.

LEGISLATURE.

See INTERPRETATION, 1.

LETTING AND HIRING.

I. *Letting of Things.*II. *Hire of Labor or Industry.*1. *Letting of Things.*

1. Persons in possession as tenants cannot, by consenting to possess for a third person, or by permitting others to disturb their possession, or to cultivate the land, affect in any manner the rights of their landlords. C. C. 3408, 3409. *Wells v. Hickman*, 1.
2. A lessor, though entitled to retain the things on which his lien exists, must, in order to be paid, have them sold in the manner provided by law; and if any conflict arise, from adverse claims to the proceeds, a distribution must be made as provided by the 6th chapter of the 21st title, of the third book of the Civil Code, establishing the order in which privileged creditors are to be paid. *Tanner v. Tanner*, 35.
3. No one can be permitted to change the character of his own possession; nor can a tenant acquire a title adverse to his landlord's, and continue to possess for himself. *Metoyer v. Larenandière*, 139.
4. Where one who has leased a house or room for a fixed period, continues in possession for a week after his lease has expired, without any opposition from the lessor, the lease will be presumed to have been continued at the same price and on the same conditions, but for no particular period, (C. C. 2659;) and under art. 2655 of the Civil Code, he will hold by the month, and can only be expelled after the fifteen days notice required by art. 2656, and can quit the premises only after giving a similar notice to the landlord. At any time within a week after the expiration of the lease, the tenant may be expelled without notice, or he may leave in like manner. *Bowles v. Lyon*, 262.
5. Where a wife is a public merchant, carrying on a separate trade, she is in no way under the control of her husband so far as her trade is concerned, and needs no authorization from him to do any act in relation to it. C. C. 128. And where she occupies as a sub-tenant part of a building leased by the husband, the owner of the building will acquire, by operation of law, on her separate property contained in the shop occupied by her, a right of pledge for the payment of his rent, to the full extent of her debt to the principal lessee. C. C. 2675, 2676, 2677. *Deslix v. Jone*, 292.

II. *Hire of Labor or Industry.*

6. The wages of an overseer are to be paid out of the product of the crop of the year, in preference to the claims of the lessor. C. C. 3226. *Tanner v. Tanner*, 35.
7. An overseer, whose services have continued during one year, and a part of

a second, has, under art. 3184 of the Civil Code, § 1, a privilege on the crop of the second year, valid against a third person, who purchases during the second year the plantation and crop then in the ground. The privilege, which had been acquired before the sale, could not be divested by it. Such a privilege is not required to be recorded, in order to preserve it. C. C. 3226, 3243. *Welsh v. Shields*, 484.

See CARRIERS.

LITIGIOUS RIGHT.

The purchase by one who had acted as the attorney at law of defendant, of a good and valid title to the land in controversy, from persons not parties to the litigation concerning it, is not such a purchase of a litigious right, as is declared to be null by art. 2422 of the Civil Code.

Evans v. Wilkinson, 172.

MANDAMUS.

1. Any error committed by a Justice of the Peace, in proceedings on an application for the removal of a tenant under the act of 3 March, 1819, relative to landlord and tenant, can only be corrected by an appeal to the Parish Court, or by an action of nullity. In case of the refusal of the Justice to allow an appeal, the remedy is by mandamus. An injunction will not lie from a District Court, to stay the proceedings under such a judgment of removal. *McLean v. Carroll*, 43.
2. If a mandate of the Supreme Court be not obeyed, the party obtaining the judgment must enforce it by a *mandamus*. *Lovlace v. Tyler*, 92.
3. A rule supported by affidavit, taken on a Judge of a Court of Probates, to show cause why a mandamus should not be issued to compel him to pronounce a judgment on a case which had been submitted for decision more than twelve months previously, will be made absolute where no cause is shown by the Judge. *State v. Judge of Probates of St. James*, 272.
4. A District Court cannot issue a mandamus to a Recorder of Mortgages, commanding him to erase certain mortgages, without having notified the parties interested. *French v. Prieur*, 299.

MARSHAL.

An officer who executes process issued by a court without jurisdiction is a trespasser, and liable in damages to the party injured.

Lowry v. Erwin, 192.

MARSHAL OF THE UNITED STATES IN LOUISIANA.

The Marshals of the United States in Louisiana, in executing process, are

bound, by an act of Congress, and the rules of the Circuit Court, to conform to the state laws; and when their proceedings form a link in a chain of title set up, the state courts will examine into their legality. A state court cannot direct a Marshal how to act, nor direct process to him to be executed; but when he has acted, and his acts are instrumental in changing the titles to property, they will, between litigants before a state court, be examined into. *Lowry v. Erwin*, 192.

MEXICAN GULF RAILWAY COMPANY.

1. Under the provision of the 15th sect. of the act of 9th March, 1837, incorporating the Mexican Gulf Railway Company, declaring that "if any stockholders shall fail to pay any instalment required to be paid, for the period of thirty days next after the same shall have become due and payable, the stock on which such instalment shall have been called in, shall be forfeited to the Company," it is optional with the Company under the circumstances mentioned, in a contest between it and the stockholder, to declare the stock and the sums paid in forfeited, or to require the execution of the obligation of the stockholder, by paying the whole amount of the shares subscribed for by him. *Mexican Gulf Railway Company v. Viavant*, 305.
2. A subscriber for the stock of an incorporated company cannot take advantage of any informalities in the manner of his subscription, unless in case of fraud or error. He will be bound to pay the amount subscribed by him, though books of subscription were not regularly opened according to the charter. *Ib.*

MINOR.

1. It being the duty of the under-tutor to act for the minor whenever the interest of the latter is adverse to that of the tutor, he is the proper person contradictorily with whom the accounts of the tutor must be settled, and the judgment rendered on such settlement fixes the amount due to the minor; but he has no authority to execute such a judgment against the tutor, so long as the latter remains in office. *Holmes v. Hemken*, 51.
2. An under-tutor has no right to receive any part of the property, nor any funds belonging to the minor. If they are considered unsafe in the hands of the tutor, or if there be any sufficient cause, the under-tutor may sue for his removal, and for the appointment of another tutor, who, on giving security, will be competent to enforce the minor's rights against his former tutor. *Ib.*
3. The tacit mortgage of a minor can only be enforced against his tutor, after the termination of the functions of the latter. If the minor, or his legal representative, does not then find in the possession of the tutor property sufficient to satisfy his claims, in consequence of sales by the tutor, or of executions levied on his property, his tacit mortgage may be enforced against

- the purchasers in the mode pointed out by art. 715, of the Code of Practice. *Ib.*
4. The emancipation of a minor under the provisions of the acts of 23d January, 1829, and 25th February, 1837, gives him all the power over his property and rights, of a person of full age. He may, consequently, ratify any act of partition or compromise effected by his tutor during his minority; and the ratification will cure all defects in the original transaction. *C. C.* 1869, 2225, 2252. *Wilson v. Craighead*, 429.
 5. Where an emancipated minor, joins with his co-heirs in an act of settlement and partition of the succession of his mother, and accepts his portion as ascertained thereby, and there is no evidence that the settlement did not embrace all the property of the succession, he will be concluded by it. *Ib.*
 6. A tutor who has received nothing, and could not have received any thing for his minor, having had nothing to act upon, has no account to render. *Ib.*
 7. The formalities prescribed for the sale of the property of minors, being exclusively for their benefit, the nullities resulting from their omission are purely relative, and the minors alone, after coming of age, can avail themselves of them. Such a sale is, consequently, not absolutely null. *Rousseau v. Tête*, 471.

MISSISSIPPI, STATE OF.

The provision of the constitution of the State of Mississippi, which declares, that "the introduction of Slaves into this State as merchandize, or for sale, shall be prohibited from and after the first day of May, 1833," is not merely directory to the Legislature, and inoperative until it shall prohibit their introduction under appropriate penalties. It is prohibitory *per se*, rendering any contract void made in contravention thereof.

Cotton v. Brien, 115.

See STATUTES, IV.

MOTION.

The right to proceed by a rule to show cause, or on motion, implies the pendency of a suit between the parties, and is confined to incidental matters, arising in the progress of the contestation, except where a summary proceeding is expressly allowed by law. *Thomas v. Bourgeat*, 435.

MOVEABLES AND IMMOVEABLES.

Bricks, made by the former owner, not to be used on the place, but for sale, and lying there at the time of a Sheriff's sale of the premises, are moveables, and not included in the adjudication of the land to the purchaser. *C. C.* 459, 460, 464, 465, 468. *Key v. Woolfolk*, 424.

MORTGAGE.

- I. *Execution of Mortgages.*
- II. *Legal and Judicial Mortgages.*
- III. *Registry of Mortgages.*
- IV. *Sale of Mortgaged Property.*
- V. *Privileges affecting Mortgaged Property.*
- VI. *Erasure of Mortgages.*

I. *Execution of Mortgages.*

1. A mortgage in favor of an absentee, executed and registered by the mortgagor, has its legal effect though not accepted by the mortgagee.

Hill v. Barlow, 142.

II. *Legal and Judicial Mortgages.*

2. The tacit mortgage of a minor can only be enforced against his tutor, after the termination of the functions of the latter. If the minor, or his legal representative, does not then find in the possession of the tutor property sufficient to satisfy his claims, in consequence of sales by the tutor, or of executions levied on his property, his tacit mortgage may be enforced against the purchasers in the mode pointed out by art. 715, of the Code of Practice.
Holmes v. Hemken, 51.
3. The words "*or otherwise disposed of the same*," in art. 2367, of the Civil Code apply not to the price of the paraphernal property sold by the wife, but to the property itself, or its value, when, in any other case than that of a sale by the wife, the husband has disposed of it for his individual interest. The legal mortgage given to the wife, by that article, on all the property of her husband for the reimbursement of the value of her paraphernal property, is not confined to the case of the sale of the property, but extends to all cases where the husband receives money for his wife or disposes of her property in any way for his individual benefit, and it attaches from the moment of such receipt or conversion. Compton v. Her Husband, 154.
4. Though the wife has a right to administer personally her paraphernal property, without the authorization of her husband, and, even where she has left its administration to him, may resume it at any time, yet if, during his administration, he has sold any part of it, she has, under art. 2367, a mortgage on his property for its value. Ib.

See 8 *Infra*.

III. *Registry of Mortgages.*

5. Where an act by which a mortgage is retained is passed in the office of a Parish Judge, acting *ex officio* as a notary public, in relation to property within his parish, no further registry is necessary to give such mortgage effect against third persons. So of the *procès-verbal* of sale made by a Pa-

- rish Judge while acting *ex officio* as an auctioneer. A Parish Judge, who acts as a notary, and as Judge of Probates, is not expected to keep a separate office in each capacity. *Dodd v. Crain*, 58.
6. A purchaser, with knowledge of an existing privilege or mortgage, cannot avail himself of its not having been registered. *Rachal v. Normand*, 88.
 7. The provisions of arts. 3314, 3316, of the Civil Code, that neither the contracting parties, nor their heirs, can take advantage of the non-inscription of a mortgage, are not irreconcilable with art. 333 of the same Code, which declares, that the effect of a mortgage will cease, even against the contracting parties, if the inscription has not been renewed before the expiration of ten years from its date. The intention of the legislator was, that a mortgage whether inscribed or not, shall cease to have its legal effect after ten years, to be reckoned, when not inscribed, as to the parties, from its date, and as to third persons from the time of its inscription, unless renewed before the expiration of that term; that, though the mortgage to have effect between the parties, need not be recorded during the first ten years from its date, yet to continue in effect afterwards, it must have been inscribed, as directed by art. 3333, before the expiration of that period; and that this inscription may be considered as a renewal of the mortgage between the parties, and against third persons. *Minor v. Alexander*, 166.
 8. Under the 5th section of the act of 20th of March, 1827, creating the office of Register of Conveyances for New Orleans, a sale of real estate can have no effect against third persons, but from the date of its registry; and where a judgment against a vendor was recorded by the Register of Mortgages, before the registry in the conveyance office of the sale from him, the sale will be without effect as to the judgment creditor; and this, though a sale of the same property, from the first vendee to the plaintiff, was registered before the judgment was recorded. *Mary v. Lampré*, 314.
 9. Neither the parties, nor their heirs, nor the witnesses to the act by which a mortgage is stipulated, can take advantage of its non-inscription during the first ten years from its date (C. C. 3316;) but it will cease to have effect, even as to them, after that period, if not inscribed before its expiration. C. C. 3333. *Lejeune v. Hébert*, 419.

IV. Sale of Mortgaged Property.

10. Mortgage creditors of a succession are entitled to notice of any application made by the executor to sell the property on which their mortgages exist. *French v. Prieur*, 299.
11. A sale of the property of a succession, legally and regularly made under a judgment of a Court of Probates, discharges the mortgages on it given by the deceased. The purchaser takes the property free of the incumbrances; and the Probate Court may order their erasure. *Ib.*
12. Plaintiff having recovered a judgment against defendants, caused a *fi. fa.* to be levied on a certain portion of a rail road belonging to them, and on certain fixtures, machinery, lumber, and other personal property connected with

the road. The whole was offered for sale *in globo*, the Sheriff producing at the sale a certificate from the Recorder of Mortgages showing the existence of a mortgage, having a preference over the plaintiff, in favor of third persons, "on all the rights, privileges, immunities, and titles of the Company." Plaintiff was the highest bidder, but offered a sum less than the amount of the mortgage. The officer returned that there had been no sale. On a rule on the latter, the defendants, and the mortgagees, to show cause why the property offered for sale should not be delivered to plaintiff: *Held*, that there was no adjudication, and that the rule should be discharged.

Ranney v. Orleans Navigation Company, 380.

See EXECUTORY PROCESS. INSOLVENCY, 13. SALE, 14.

V. Privileges affecting Mortgaged Property.

13. Where in the settlement of the estate surrendered by an insolvent, the proceeds of the moveables are insufficient to pay the privileged charges, the property on which liens or mortgages exist, and not the creditors holding such liens and mortgages, must contribute to their payment.

Caseaux v. His Creditors, 268.

14. Where an owner of ground, an undertaker or builder by trade, borrows a sum of money for the purpose of building thereon, the amount to be advanced to him according to the progress of the work, executing a mortgage on the property improved to secure its re-payment, and employs workmen to construct the buildings under his own directions, the latter will, under art. 2743 of the Civil Code, be entitled to a privilege for the payment of their labor on the building constructed by them, entitling them to be paid in preference to the mortgage creditor. It is only where there is an undertaker interposed between the owner and his workmen, that arts. 2744 and 2745 of the Civil Code are applicable. Where workmen are employed by the proprietor himself, they are put on the same footing, and allowed the same privilege as an undertaker. Succession of Erard, 333.

See INSOLVENCY, 17.

VI. Erasure of Mortgages.

15. A District Court cannot issue a mandamus to a Recorder of Mortgages, commanding him to erase certain mortgages, without having notified the parties interested. French v. Prieur, 299.
16. On an application for a mandamus to compel the erasure of the mortgages existing on property sold by order of a Probate Court, the declaration of the applicant is not the best evidence of the sale; the *procès-verbal* of the sale and adjudication should have been produced. *Ib.*

See INSOLVENCY, 9.

NATURAL CHILD.

1. The acknowledgment of an illegitimate child in a will, is sufficient to entitle

such child, when not a colored one, to be considered a duly acknowledged natural child, and to receive as such. C. C. 221, 226, 227.

Jones v. Hunter, 236.

2. A disposition in favor of a natural child or children, cannot exceed one-fourth of the property of the testator, if he leave a legitimate brother or sister, or one-third, if he leave more remote collateral relations. C. C. 1473. The remainder of his estate must go to his legitimate relations. Ib. 1474. Ib.

NEUTRAL TERRITORY.

See PUBLIC LANDS OF THE UNITED STATES.

NEW ORLEANS.

1. The erection of wharves before the city of New Orleans and its suburbs, at such places as commerce may require, is a legitimate exercise of power by the Council of any of its Municipalities.
Shepherd v. Third Municipality of New Orleans, 349.
2. Under an ordinance of the Council of the Second Municipality of New Orleans, which had been in force for several years, a fixed annual tax was levied on the assessed value of the real estate within the Municipality. In the month of December it was ascertained that the revenues of the Municipality would be insufficient to discharge its debts; and an ordinance was passed laying an additional tax for the year ending with that month, and for the succeeding year. In an action to recover the increased tax for the year just expiring: *Held*, that no period of the year being fixed by law when the tax shall be laid, the retrospective operation of the ordinance is no proof of its illegality. Second Municipality of New Orleans v. Orleans Cotton Press Company, 411.
3. The fifth section of the act of 10th March, 1834, relative to the powers of the Mayor and City Council of New Orleans, and the ordinances of the Second Municipality of that city, of December, 1838, require a notification to the tax payer, before he can be made liable for interest at the rate of eight per cent a year, on the taxes due by him. Where he has not been put in default, interest can be recovered only from judicial demand. Ib.

NEW TRIAL.

1. The omission of counsel to interrogate a witness as to a particular fact, is no ground for a new trial. Lowry v. Erwin, 192.
2. A new trial will not be granted on an affidavit by one of the counsel of a defendant that he had discovered, since the judgment, new and material evidence, of the existence of which he was not aware at the time of the trial, though he had used due diligence, &c., where it is not shown that the defendant, or his other counsel, were also ignorant of the existence of such

evidence, and the witness by whom the new fact is expected to be proved was examined on the trial of the cause. *Ib.*

NOLLE PROSEQUI.

1. A District Attorney, prosecuting on behalf of the State, may enter a *nolle prosequi* at his discretion, subject only to the right of the defendant, after trial commenced and evidence given, to insist on a trial. The court has no right to control the attorney of the State, in this respect.
State v. Bugg, 63.
2. The sureties in a bond to the State for the good behavior of a party and his appearance at court, may avail themselves of all the pleas which their principal could urge. A *nolle prosequi* entered as to their principal, will discharge them. *Ib.*

NONSUIT.

A plaintiff may discontinue his action, at any time before judgment has been rendered, on paying the costs. C. P. 491. But he has no right to call upon the court for a judgment of nonsuit. As a general rule, when the plaintiff does not make out his case, the judgment against him should be one of nonsuit; but there are circumstances which render this rule inapplicable and which ought to be considered sufficient to put an end to the matter in litigation. Such circumstances, growing out of the evidence, are to be left to the sound and legal discretion of the court, without any interference on the part of the parties. *Crocker v. Turnstall, 354.*

NOTARY.

See **BILLS OF EXCHANGE AND PROMISSORY NOTES, 13 to 17, and 20 to 26. REGISTRY, 1.**

NOTICE.

See **BILLS OF EXCHANGE AND PROMISSORY NOTES, 13 to 17, and 20 to 26. JUDGMENT, 10, 11.**

NOVATION.

1. Where notes were given by defendant and another person, for a purchase made in violation of a prohibitory law rendering the transaction null and void, the substitution of a single note by defendant alone for a balance due after a part payment, will not bar the latter from pleading the illegality of the original contract. *Per Curiam.* The debt does not cease by the release of one of the original debtors, to be the same debt, growing out of the same transaction. *Cotton v. Brien, 115.*

2. Where the holder of a note endorses on it that he has received from the maker four smaller notes, amounting together to the sum for which the first note was given, which when paid, will be in full of the original note, he may sue on the latter, but to protect the defendant from the danger of suits by endorsees of the smaller notes, the judgment should provide that no execution be issued, nor the judgment itself be recorded by the Recorder of Mortgages, until the smaller notes are delivered to the defendant, or deposited for him in court. *Rieder v. Theurer*, 375.
3. Where for the convenience of the vendors, in order to enable them to divide the price among themselves, the notes originally given by the vendees, are cancelled, and others executed in their place, each for smaller sums, but in the aggregate for the same amount, in the same form, and payable at the same periods, nothing being changed as to the position or obligations of the purchasers, there is no novation.

Citizens Bank of Louisiana v. Tucker, 443.

NULLITY.

See CONTRACTS, 2. DONATIONS INTER VIVOS. SALE, VI.

OFFENCES AND QUASSI OFFENCES.

1. An officer who executes process issued by a court without jurisdiction is a trespasser, and liable in damages to the party injured.

Lowry v. Erwin, 192.

2. Plaintiffs having obtained a judgment against defendant in another State, instituted a suit on the judgment here, attaching certain property, and, pending the attachment, transferred their judgment to one of their creditors, to be applied towards the satisfaction of his claim. A third person having intervened in the attachment suit, and proved the property to be his, claiming damages for the illegal attachment, against the plaintiffs and their transferee: *Held*, that the damage sustained by the intervenor resulted from the original levy of the attachment; that the plaintiffs having, even after the transfer, a greater interest in the action than their transferee, the latter could not have dismissed the attachment; and that, consequently, judgment for damages could be rendered only against the plaintiffs.

Caldwell v. Mayes, 376.

3. As between the principal and surety in an attachment bond, and the defendant in whose favor it is executed, a claim for damages for an illegal attachment is *ex contractu*; but if the property of a third person be attached under proceedings authorizing the seizure of that of the defendant, it is a trespass, and the right of the party injured to obtain reparation arises neither from a contract, nor quasi-contract, but under art. 2294 of the Civil Code, which declares that every act of man which causes damage to another, obliges him by whose fault it happened, to repair it.

Edwards v. Turner, 382.

4. The distinction between offences and quasi-offences is, that the former are those illegal acts which are done wickedly and with the intent to injure, while the latter are those which cause injury to another, but proceed only from error, neglect, or imprudence. *Ib.*
5. The attachment of the property of a third person, as belonging to the defendant, is a quasi-offence; and the action by the owner for damages is prescribed by one year from the time of the injury—that is, from the time of the seizure, and not from the date of the judgment establishing the title of the owner. *C. C. 3501, 3502. Ib.*
6. Defendants, in the absence of plaintiff, seized under a *fi. fa.* against a third person, furniture belonging to the plaintiff, and sold it. The plaintiff's landlord afterwards claimed and received the proceeds, in virtue of his privilege on the furniture for rent. In an action for the value of the furniture against the Sheriff and the seizing creditors, there was a judgment for the defendants. On appeal: *Held*, that the court below erred; that it is no excuse for the defendants, if their acts were illegal and caused damage to the plaintiff, that they gained nothing by them, and that another got the money they were endeavoring to obtain; that the course pursued by the defendants compelled the landlord to assert his claim, and that it is not shown that he would, in the absence of the plaintiff, have taken any step to have the furniture sold. Case remanded. *Lawrence v. Hozey, 385.*
7. In an action for damages, for an assault and battery and slander, evidence as to the plaintiff's character is inadmissible, even in mitigation of damages. *Gardner v. Cross, 454.*

See SHIPPING, 2.

OWNERSHIP.

Ornaments of gold and precious stones deposited in a tomb with the body of the deceased, are corporeal things, (*C. C. 451.*) susceptible of ownership, (*C. C. 480.*) subject to be taken possession of by the rightful owner, the heir of the deceased, and to be alienated by him.

Ternant v. Boudreau, 488.

OPPOSITION OF THIRD PERSONS.

See INJUNCTION, 5.

PARISH JUDGE.

A Parish Judge, who acts as a notary, and as Judge of Probates, is not expected to keep a separate office in each capacity. *Dodd v. Crain, 58.*

See COURTS, IV.

PARTNERSHIP.

1. The laws of this State recognise no authority in a surviving partner. He cannot administer the effects of the partnership, until regularly appointed; nor is he then styled the surviving partner, but administrator. Nor will the omission of a defendant to except to the capacity of one who sues as a surviving partner, be considered as an admission of his right to sue as such. That which has no legal existence cannot be considered as tacitly admitted.
Notrebe v. Kenney, 13.
2. After the dissolution of a partnership no one of the partners can use the social name so as to bind the others. Any authority to do so must be derived from a new contract between the parties, and such a contract is essentially one of mandate. To draw or endorse any bill, or note, in the name of the former partnership, the authority must be express and special. C. C. art. 2966. Reedy v. Harding, 70.
3. A partner in an ordinary partnership, may, during its existence, bind his co-partner, if it be shown that the transaction benefitted the partnership. C. C. art. 2845. *Ib.*
4. The members of a private association, formed for the purchase of steamers, and the transporting of passengers and merchandize for hire, are commercial partners; and where the partnership has been dissolved, they may be sued for a debt due by the association individually, or a part of them only, without joining the rest. Lambeth v. Vawter, 127.
5. Commercial partners are bound, *in solido*, for the debts of the partnership towards third persons. Their responsibility is not limited to the interest they may have in the concern, though the extent of such interest was known to the party with whom the contract was made. *Ib.*
6. Where the members of a private association, formed for commercial purposes, have agreed that the affairs of the partnership shall be conducted by a president and directors, who are actually chosen, no individual partner can bind the firm. By choosing these officers, the partners have selected the administrators of the partnership affairs. *Ib.*
7. Admissions made after the dissolution of a partnership, by one who had been a member, are not binding on those who were associated with him.
Ib.
8. In ordinary partnerships, each partner is only bound for his share of the partnership debts to be calculated in proportion to the number of partners, and without reference to the portions of the stock or profits to which each may be entitled. C. C. 2844. Griffin v. His Creditors, 216.
9. The proprietors of steamers, such as are employed in towing vessels between New Orleans and the Gulf of Mexico, are commercial partners. C. C. 2796. *Per Curiam*. It does not follow because these boats have no privilege for their hire, that their owners are not responsible in the same manner as the owners of boats differently employed. Privileges are arbitrary provisions of the law. Davis v. Houren, 255.

10. After the dissolution of a partnership, none of the members can bind the others without special authority from them. Nor can they, after such a dissolution, bind the others, or the firm, for the payment of a debt which has been prescribed, any more than they can create an entirely new obligation. *Ib.*
11. Where the name of a party forms a part of the commercial name of a partnership against whom a judgment has been obtained, it is, at least, *prima facie* evidence that he was a member of the firm; and a *fi. fa.* levied on his property to satisfy the judgment, will be maintained, unless it be shown that he was not a member. *Mary v. Lampré*, 214.
12. The appellant, a partner of the insolvent in a saw mill, was to manage the business, taking charge of the receipts and disbursements, and to be entitled to a certain portion of the profits after all expenses were deducted. The insolvent was to furnish the land, buildings, laborers, and necessary capital for the purchase of materials. The appellant claims, under art. 2157, § 1, 3, of the Civil Code, to be subrogated to the rights of certain mechanics and laborers employed on the mill whose claims had been paid by him. *Held*, that there was no subrogation; that the debts were paid by the appellant in the course of his administration of the partnership business; and that, as to the insolvent, any advances made by the appellant could give him only the privilege of a partner on the partnership property, entitling him to be paid out of its proceeds in preference to any individual creditor of the insolvent.
Gordon v. His Creditors, 328.
13. In an ordinary partnership, formed for a particular purpose, neither of the partners can bind the other unless authorized to do so, specially, or by the articles of partnership. *C. C.* 2843. *Bourgerol v. Allard*, 351.
14. One of two partners in a particular adventure, may renew a note given by a purchaser of the partnership property, without exceeding his authority as a partner. Whatever he does fairly and honestly, before the final consummation of the business, will be binding on his co-partner.

Lallande v. Bouny, 363.

PATENT.

See PUBLIC LANDS OF THE UNITED STATES, 1, 2.

PAYMENT.

1. A plea of payment will not authorize evidence of an adverse claim in compensation not equally liquidated with plaintiff's demand. *C. C.* 2205. *C. P.* 367. *Maxwell v. Collier*, 86.
2. An imputation of payment made by a creditor, and subsequently ratified by the debtor, will take effect from its date, though the former may, in the in-

terval, have become the holder of another debt to which the debtor, or one bound as surety for him, might otherwise have required it to be imputed.

Metoyer v. Trezzini, 124.

3. Where a creditor becomes the purchaser of property sold at her instance at a Sheriff's sale, subject to her mortgage and privilege as vendor, the debt secured by such mortgage and privilege is, *pro tanto*, extinguished by confusion. She cannot claim to have the price bid by her imputed to another debt, so as to affect the rights of other creditors.

Griffin v. His Creditors, 216.

4. The rules laid down by the Civil Code, art. 2162, relative to the imputation of payments where two debts are of the same nature and equally onerous, apply to settlements between debtor and creditor; they cannot be enforced to the prejudice of third persons. *Ib.*
5. Where in an action on a note, defendant claimed credit for a sum proved to have been paid to plaintiff, but the latter alleged that the payment was made in discharge of another debt: *Held*, that it was for the plaintiff to show that he was the holder of another obligation, which had been, or ought to have been credited with the amount. *Mann v. Major*, 475.

See PLEADING, 17.

PHYSICIAN.

A physician's bill is prescribed by three years. C. C. 3503.

Arbonneaux v. Letorey, 456.

See COMPENSATION, 2.

PLEADING.

- I. *Parties to Actions.*
- II. *Actions, Where to be brought.*
- III. *Exceptions and Answer.*
- IV. *Admissions.*
- V. *Interrogatories to a Party.*
- VI. *Possessory and Petitory Actions.*
- VII. *Actions to Annul Sales made by an Insolvent, and Proceedings where there has been a Surrender of Property.*
- VIII. *Actions by Heirs or Legatees to obtain Possession of Successions.*

I. *Parties to Actions.*

1. A creditor of a succession, holding a claim which had been acknowledged,

in writing, by the executor to be just, and had been placed among the admitted claims against the estate, subsequently petitioned the Probate Court to have the same ranked as a privileged debt, but did not make the executor a party to the proceeding. A judgment having been rendered *ex parte*, establishing the privilege, on appeal by the executor: *Held*, that the executor, not being a party, the judgment must be reversed.

Succession of Lilley, 24.

2. A married woman, not separated from bed and board, cannot sue or be sued, without the authorization of her husband, or that of the Judge before whom the suit is brought. Nor can she appeal from a judgment rendered against her, without having been so authorized. *Cuny v. Dudley*, 77.
3. The omission of a plaintiff in an action against a married woman, to cause her to be authorized, either by her husband or the court, to defend the suit, rendering the proceedings absolutely null, will be noticed by the court, though it escape the attention of the parties. In such a case the judgment may be reversed, and the case remanded to enable the plaintiff to have the opposite party legally authorized to defend the action.

Robinson v. Butler, 78.

4. The members of a private association, formed for the purchase of steamers, and the transporting of passengers and merchandize for hire, are commercial partners; and where the partnership has been dissolved, they may be sued for a debt due by the association individually, or a part of them only, without joining the rest. *Lambeth v. Vawter*, 127.
5. Under the bankrupt law of 1841, all the estate of the bankrupt is, by the issuing of the decree of bankruptcy, *ipso facto*, vested in the assignee. It is his duty to take possession without delay, and to administer the property to the best advantage for the benefit of the creditors. If resistance be made, the State courts will grant the necessary process to enable him to do so. The assignee may make himself a party to suits in the State courts in place of the bankrupt, and take the necessary steps to protect the property and interests confided to his care. *Lewis v. Fisk*, 159.
6. Where an endorser, the wife of the maker of a note, could not sue the latter, her endorsee cannot. *Doll v. Theurer*, 276.
7. In every suit on a joint contract, all the obligors must be made defendants, though some may have paid their proportion of the debt; and no judgment can be obtained against any, unless it be proved that all joined in the obligation, or are by law presumed to have done so. *C. C. 2080*.

Bourgerol v. Allard, 351.

II. Actions, Where to be brought.

8. An action against a party in possession of slaves, in which the plaintiff prays for a judgment declaring the title under which the former holds to be fraudulent, and ordering the slaves to be sold for the purpose of paying a balance due to him as vendor, with damages for the expense to which he has been subjected, and recognizing his privilege as a vendor, must be

- brought before the court of the defendant's domicile, and not of the parish where the slaves may be. C. P. 89, 129, 162. *Boner v. Elgee*, 6.
9. An affidavit to disprove one made by the opposite party, for the purpose of removing a case from a State Court to a Circuit Court of the United States, under the 12th section of the act of Congress, of the 24th September, 1789, is inadmissible. The citizenship of the parties is a fact to be shown to the satisfaction of the court, and this showing is necessarily *ex parte*. The order of removal is not final; it is for the United States Court to decide ultimately upon its jurisdiction, which may remand the case to the State Court, should it think itself without jurisdiction. *Franciscus v. Surget*, 33.
 10. Where a defendant in an action to recover a sum of money dies *pendente lite*, if the heirs be of age and have accepted the succession unconditionally, they may be made parties, and the suit must be prosecuted to judgment in the ordinary courts; but where the succession has not been accepted purely and simply, and is in the hands of an administrator, curator, or executor, Courts of Probate have exclusive jurisdiction to decide on all claims for money against it, and to establish the rank of the privileges, and the mode of payment. C. P., 924. *Thomas v. Cortes*, 44.
 11. It does not follow from the provisions of arts. 21, 120, and 361 of the Code of Practice, that actions shall not abate by the death of one of the parties, but may be continued between the survivor and the heirs of the deceased, that they must continue to be prosecuted in the courts in which they were instituted. All such actions founded on claims for money, on the death of the defendant, must be cumulated with the mortuary proceedings in the Probate Court, and there prosecuted to judgment, unless admitted by the administrator. The creditors have the right of contesting each other's claims in a *concurso*, before the Probate Court, by which they will be paid a *pro rata* dividend in case of the insolvency of the succession. Though no express provision has been made for the transfer of such actions, the law has, by investing the Court of Probates with jurisdiction, impliedly conferred the means necessary to its exercise. The transfer of the record is necessary to the exercise of jurisdiction by the Probate Court. *Ib.*
 12. A creditor, residing in another state, cannot sue in the Circuit Court of the United States, an executor, curator, or administrator of an estate, in course of administration in a Court of Probates, as an insolvent estate, and obtain judgment, and issue execution thereon in violation of the state laws, and take the property out of the hands of the officer administering it, to the injury of the domestic creditors. But if such executor, administrator, or curator, refuse to admit the justice of a debt claimed by an alien or non-resident, and to class it as an acknowledged debt against the succession to be paid as others, he may be sued in the Circuit Court of the United States, and a judgment liquidating the demand may be obtained; but the judgment must provide that it is to be paid in due course of law, out of the assets in the hands of the executor, &c., to be administered, and no execution can

be issued in favor of an alien or non-resident creditor, unless one could be issued, in a similar case, in favor of a domestic creditor.

Lowry v. Erwin, 192.

13. Defendant having purchased a plantation and slaves at a Sheriff's sale, made under a *fi. fa.*, issued on a judgment obtained by him against the plaintiff, procured a monition to show cause why the sale should not be homologated. Plaintiff opposed the homologation, and, on the same day, brought suit, in the parish where the land was situated, and not that of defendant's domicile, to recover the land and slaves, with their fruits and revenues, and for damages against the defendant for having illegally and forcibly taken possession. The sale having been avoided, on the opposition to the monition, defendant prayed for the dismissal of the action, on the grounds that the main question, of title, had been decided on the monition, and that the plaintiff had no right to cumulate with his petitory action, a personal one against the defendant, for the fruits and revenues, or for damages: *Held*, that notwithstanding his opposition to the monition, plaintiff had a right to commence the action; that, though the question of title was decided on the monition, that as to defendant's liability for the fruits and revenues, was undetermined, and that being a mere incident of the action of revendication, the suit was properly brought in the parish where the property is situated, although the defendant resides in another; and that jurisdiction having been once vested, it could not be divested by a judgment on a part of the matter in controversy. C. P. 153, 154, 162, 163. Winter v. Zacharie, 466.
14. A crop, made after the dissolution of the community, by the husband, on land belonging to him, partly with his own slaves, and partly with those of the community, cannot be considered as belonging to the community, nor be included in its settlement before the Probate Court. The husband is bound to account to the heir for the value or proceeds of the labor of the slaves, having acted as his *negotiorum gestor* in the administration of his property; but this has nothing to do with the settlement of the community. The action of the heir, must be brought before the ordinary tribunals.

Babin v. Nolan, 508.

III. Exceptions and Answer.

15. Where defendant is in possession of a judgment for a certain sum, payable in specie, from which no appeal has been taken, an allegation by the party against whom it was rendered, that, by the original contract, he was entitled to discharge the debt in the notes of a particular bank, cannot be inquired into on an application to enjoin the execution. Such a defence should have been urged in the original suit in which the judgment was rendered, under which the execution was issued.

Dayton v. Commercial Bank of Natchez, 17.

16. In an action by one for the use of another, the latter is the real plaintiff.

In such an action the defendant may urge any defence he may have against the nominal, or the real plaintiff.

17. A plea of payment will not authorize evidence of an adverse claim in compensation not equally liquidated with plaintiff's demand. C. C. 2205. C. P. 367. *Maxwell v. Collier*, 86.

18. An accommodation endorser, being viewed as a surety, may avail himself of any plea which his principal could have opposed to the holder.

Satterfield v. Compton, 120.

19. A defence that a memorandum of a contract of sale had been altered by the plaintiffs without the consent of the defendants, not made in the lower court, cannot be urged after appeal. *Grimshaw v. Hart*, 265.

20. In an action against the maker and endorser of a note, the defendants excepted to the action as premature, on the ground that the amount claimed by plaintiff was not yet demandable; as the latter, after the maturing of the note sued on, by a special agreement with the drawer, for a consideration received from him, had granted him a certain time within which to pay the note, which delay had not yet expired. The exception was sustained. After the expiration of the delay, the plaintiff obtained a judgment by default, which was set aside, the defendants filing separate answers, and the endorser urging that he had been discharged by the delay. There was a judgment against the maker, but in favor of the endorser. On appeal: *Held*, that though the fact of granting the delay was shown, the exception having been pleaded by both defendants, proved that the endorser knew that the delay had been granted, and consented to it, and that, having enjoyed the benefit of the plaintiff's indulgence, he is not discharged.

Gordon v. Dréux, 399.

21. The plea of prescription is one of those peremptory exceptions, which, without going to the merits of the cause, show that the plaintiff cannot maintain his action, and may be pleaded specially in every stage of the action, previous to final judgment. Such exceptions raise no issue on the merits. Thus where a judgment by default has been set aside on filing a plea of prescription, and the exception is overruled, the case cannot be tried on its merits, until put at issue by an answer, or by a judgment by default, regularly entered, after the overruling of the exception. C. P. 345, 346.

Lejeune v. Hébert, 419.

22. An exception to a petition on the ground that the name under which the plaintiff sued is not his real name, will be overruled, where it does not state the name under which alone he could have sued.

Gardiner v. Cross, 454.

23. No dilatory exception can be pleaded after a judgment by default. Act 20th March, 1839, § 23. *Welsh v. Shields*, 484.

IV. Admissions.

24. The laws of this State recognize no authority in a surviving partner. He cannot administer the effects of the partnership, until regularly appointed;

nor is he then styled the surviving partner, but administrator. Nor will the omission of a defendant to except to the capacity of one who sues as a surviving partner, be considered as an admission of his right to sue as such. That which has no legal existence cannot be considered as tacitly admitted.

Notrebe v. M'Kinney, 13.

25. Where the petition alleged that an act of mortgage was intended by both mortgagors and mortgagees to secure to the latter an unjust and illegal preference, plaintiffs will be estopped from averring that the mortgage was unknown to the mortgagees, and not accepted by them.

Hill v. Barlow, 142.

V. *Interrogatories to a Party.*

26. Where a defendant, after having obtained several continuances, moves for leave to file an amended answer propounding interrogatories to the plaintiff, a resident of another State, evidently merely for delay, permission will be refused. Yeatman v. Henderson, 81.

27. Where a party to whom interrogatories have been propounded, states facts not closely connected with those as to which he has been questioned, the opposite party should move to strike out such irrelevant matter.

Wells v. Hickman, 1.

28. Under art. 351 of the Code of Practice, a party to an action to whom interrogatories are propounded can be required to answer, in open court, only when he resides in the parish where the court sits. Where his residence is out of the parish, but within the State, it is the duty of the party propounding the interrogatories to obtain from the court a commission directed to some Judge, or Justice of the Peace, in the parish in which the party interrogated resides, to receive his answers; or the interrogatories, if unanswered, cannot be taken *pro confessis*. C. P. 352.

Crocker v. Turnstall, 354.

VI. *Possessory and Petitory Actions.*

29. After an adjudication under a *fi. fa.*, which divests the defendant in execution of his title to the property, he can no longer be considered as possessing as owner, which is essential to maintain a possessory action. C. P. 47. He must, if he still claims the property, resort to a direct action to annul the Sheriff's sale. Winn v. Elgee, 100.
30. A curator *ad hoc*, may be appointed to represent an absent defendant in a petitory action, as in any other. Art. 116 of the Code of Practice, does not limit the right of appointment to any particular class of actions.

Beaumont v. Covington, 189.

VII. *Actions to annul Sales made by an Insolvent, and Proceedings where there has been a Surrender of Property.*

31. It is essential to a revocatory action in which an act of an insolvent is at-

INDEX.

acted, or having been taken in fraud and to the injury of the creditors, that fraud should be alleged against the debtor, who must be a party to the suit. *Lawrence v. Bowman*, 21.

29. Opponents having been filed to the homologation of a *tableau* of distribution presented by the syndic of an insolvent, praying for the cancelling of the sales made by the syndic, that the property be disposed of again for the benefit of all the creditors, and the *tableau* set aside, the opponents subsequently filed other oppositions by way of amendment, in which, abandoning the objects of the first oppositions, and waiving their purpose of discrediting the sales and resisting the homologation of the *tableau*, they pray that the syndic may be condemned, personally, to pay them the amounts for which they were placed on the *tableau* as creditors of the insolvent, on the ground of his having acted without any regular appointment, having sold the property illegally, and for his neglect and waste of the property: Held, that the demands in the original and amended oppositions are inconsistent, the one precluding the other, and cannot be sustained in the same action, (C. P. 140;) that the demands in the original oppositions must be considered as abandoned by the supplemental oppositions; and that any claim for damages against the syndic, personally, for maintenance, should be brought against him individually, and not by way of opposition to a *tableau* of distribution. *Baker v. His Creditors*, 502.

VIII. Actions by Heirs or Legatees to obtain Possession of Successions.

22. In actions by the heirs, or others entitled to succeed to administrations by creditors or testamentary executors, for the possession of such successions, under arts. 1000, 1001, 1002 and 1003 of the Code of Practice, as in every other suit, there must be an issue joined before any final judgment can be rendered; and if the executor or executor does not answer, issue must be made by a judgment by default. C. P. 310, 311, 312. Such motions must be in the ordinary form. The provision of art. 1002, the judge shall pronounce on the claim in a summary manner, only means, as shown by art. 1004, that he shall decide upon it with the greatest practicable celerity, giving it a preference over ordinary cases. *Caldwell v. Glenn*, 6.

PLEDGE.

See INSOLVENCY, 9. PRIVILEGE, 7.

POSSESSION.

1. Persons in possession as tenants cannot, by consenting to possess for a third person, or by permitting others to disturb their possession, or to cultivate the land, affect in any manner the rights of their landlords. C. C. 3400, 3402. *Wells v. Hickman*, 1.

2. The possession of a debtor against whom a judgment has been rendered, is divested by the legal seizure under a *feri facias*, and is vested in the Sheriff until the property is disposed of. He is regarded as the rightful possessor, and can maintain an action of trespass against any person disturbing him in such possession. It is his duty to take the property into actual possession. If it be a plantation, it remains sequestered in his custody until the sale, and he may appoint a keeper or manager; and if resisted in the execution of his orders, may employ force, and summon the *posse comitatus*. C. P. 656 to 662, and 762. Winn v. Elgee, 100.
3. No one can be permitted to change the character of his own possession; nor can a tenant acquire a title adverse to his landlord's, and continue to possess for himself. Metoyer v. Larenandière, 139.
4. Parol evidence is inadmissible to prove that plaintiff was the owner of the land in dispute, and leased it to the defendant, and that the latter committed a fraud in converting it to his possession. It would tend to make out a title to real estate by parol. Ib.
5. The possession of an agent, is the possession of the principal.
Beaumont v. Covington, 189.
6. A possessor in good faith, under a title which he honestly believes to be just in point of fact and form, is entitled to his improvements, and is not bound to account for the fruits and revenues, until the property is claimed by the real owner. The possession and title must be such as to entitle the party to the prescription of ten years. The possessor in good faith is one who has just reason to believe himself the master of the thing which he possesses, though he may not be so in fact, (C. C. 3414;) the possessor in bad faith, one who knows that he has no title, or that his title is defective. Ib. 3415. Lowry v. Erwin, 192.
7. A judgment by a court having no jurisdiction or authority to render it, is null and void; and one possessing under it, is not a possessor under a just title and in good faith, so as to exempt him from liability for the fruits and revenues, until claimed by the owner. To exempt him, as a possessor in good faith, from such liability, the possession must have been valid in point of form. C. C. 3452. Ib.
8. A possessor without a just title, owes the fruits and revenues from the commencement of his possession. Ib.

See PRESCRIPTION, 12.

PRESCRIPTION.

1. By an act of the Legislature of the State of Mississippi, of the 26th of November, 1821, sect. 115, it is provided, that any claim against the estate of one deceased, not presented to the executor, administrator, or collector within eighteen months after the publication of notice for that purpose by such executor, &c., shall be forever barred, and the estate discharged

- therefrom. Plaintiff, a resident of that State, being the holder of a claim against the estate of the deceased barred by that act, commenced an action against the administrator of a part of the succession situated in this State. *Held*, that the claim being barred in Mississippi, must be considered so in this State. *Harrison v. Stacy*, 15.
2. Prescription is interrupted by a citation to the party in whose favor it is running, to appear before a court of justice on account of the right or claim to which the prescription would apply. This is called a legal interruption, and it matters not whether the suit be before a court of competent jurisdiction, or not. C. C. 3482, 3484, 3516. The party must be cited. No other means of knowledge of the proceedings instituted against him, though brought home to him, will suffice to operate a legal interruption.
Hill v. Barlow, 142.
 3. Acceptance of service of citation by a curator *ad hoc* appointed to represent an absent defendant, will not interrupt prescription as to the latter. Art. 177 of the Code of Practice which provides for the waiver, or acknowledgment of service, in writing, under the signature of the defendant or his attorney, on the back of the original petition, does not apply to a curator *ad hoc*. Such waiver or acknowledgment can only be made by the defendant personally, or by the attorney whom he has employed. *Ib*.
 4. The exercise of the right of claiming prescription is an act of ownership; and its abandonment is one of alienation, which no agent can do so as to deprive his principal of his right to claim it, without special authority from the latter. *Ib*.
 5. No contract between a debtor and one of his creditors, for the purpose of securing a just debt, though the debtor were insolvent to the knowledge of the creditor, and although the other creditors be injured thereby, can be annulled after one year, reckoning from its date to the time of bringing the suit to avoid it. C. C. 1982. *Ib*.
 6. An acknowledgment of a debt by any one of several debtors bound *in solido*, interrupts prescription as to all. - The words *joint-debtor* in art. 3517 of the Civil Code, were inserted in the English text of the article through an error of the translator or transcriber. *Davis v. Houren*, 255.
 7. The attachment of the property of a third person, as belonging to the defendant, is a quasi-offence; and the action by the owner for damages is prescribed by one year from the time of the injury—that is, from the time of the seizure, and not from the date of the judgment establishing the title of the owner. C. C. 3501, 3502. *Edwards v. Turner*, 382.
 8. A partial payment, before prescription acquired, will interrupt the prescription. *Lejeune v. Hébert*, 419.
 9. The plea of prescription is one of those peremptory exceptions, which, without going to the merits of the cause, show that the plaintiff cannot maintain his action, and may be pleaded specially in every stage of the action, previous to final judgment. Such exceptions raise no issue on the merits. Thus where a judgment by default has been set aside on filing a plea

of prescription, and the exception is overruled, the case cannot be tried on its merits, until put at issue by an answer, or by a judgment by default, regularly entered, after the overruling of the exception. C. P. 345, 346.

Ib.

10. A physician's bill is prescribed by three years. C. C. 2503.

Arbonneaux v. Letorey, 456.

11. Prescription may be pleaded in every stage of the case before final judgment, and even on appeal; but it must be pleaded expressly and specially. C. C. 3427. The court cannot supply such a plea, where the party, in whose favor it exists, has not thought proper to take advantage of it. C. C. 3426. Ib.

12. Where there was error on the part of the vendor in delivering, and on the part of the vendee in receiving the possession of property sold, such possession cannot serve as a basis for the prescription of ten years; as where lands resold by a purchaser from the United States, having been erroneously located, the possession in conformity thereto was necessarily erroneous.

Kittridge v. Landry, 477.

13. No title to any portion of the public lands of the United States can be acquired by prescription. Kittridge v. Dugas, 482.

14. A mother, a slave, having been emancipated, her infant child, about eight months old, was suffered to remain with her until the death of her former owner, when the child was sold with the other property of the deceased. The child was then about twelve or thirteen years old. *Held*, that the circumstance of the child's being left with its mother at so tender an age, cannot be considered as evidence of an intention to permit the enjoyment of liberty, within the meaning of art 3510 of the Civil Code; and that the prescription of ten years established by that article is not applicable to such a case. Verdun v. Splane, 530.

15. The master of a merchant vessel or steamer, is an officer, within the meaning of art. 3499 of the Civil Code, and the action for his wages is prescribed by one year. Millaudon v. Martin, 534.

SEC POSSESSION.

PRIVILEGE.

1. The wages of an overseer are to be paid out of the product of the crop of the year, in preference to the claims of the lessor. C. C. 3226.

Tanner v. Tanner, 35.

2. A lessor, though entitled to retain the things on which his lien exists, must, in order to be paid, have them sold in the manner provided by law; and if any conflict arise, from adverse claims to the proceeds, a distribution must be made as provided by the 6th chapter of the 21st title, of the third book of the Civil Code, establishing the order in which privileged creditors are to be paid. Ib.

3. A purchaser, with knowledge of an existing privilege or mortgage, cannot avail himself of its not having been registered. *Rachal v. Norman*, 88.
4. The privilege on the price of the property sold, where the price has not been paid by the purchaser, nor passed into an account current between him and the insolvent, granted to the consignor by art. 3215 of the Civil Code, in the event of the insolvency of the consignee, will not be affected by the fact that the property was sold with other property of the same kind, and one note taken for the price of both, where the bill of sale shows the price of each parcel, and the amount collected by the syndic can be apportioned accordingly. *Caseaux v. His Creditors*, 268.
5. Where in the settlement of the estate surrendered by an insolvent, the proceeds of the moveables are insufficient to pay the privileged charges, the property on which liens or mortgages exist, and not the creditors holding such liens and mortgages, must contribute to their payment. *Ib.*
6. The privilege of a vendor on the unpaid price of property sold by an agent who has made a *cessio bonorum*, is superior to that acquired by levying a *fi. fa.* on notes given for the price, in the hands of an attorney of the insolvent before his cession. *C. C. 3215. C. P. 722. Ib.*
7. Where a wife is a public merchant carrying on a separate trade, she is in no way under the control of her husband so far as her trade is concerned, and needs no authorization from him to do any act in relation to it. *C. C. 128.* And where she occupies as a sub-tenant part of a building leased by the husband, the owner of the building will acquire, by operation of law, on her separate property contained in the shop occupied by her, a right of pledge for the payment of his rent, to the full extent of her debt to the principal lessee. *C. C. 2675, 2676, 2677. Deslix v. Jone*, 292.
8. Where an owner of ground, an undertaker or builder by trade, borrows a sum of money for the purpose of building thereon, the amount to be advanced to him according to the progress of the work, executing a mortgage on the property improved to secure its re-payment, and employs workmen to construct the buildings under his own directions, the latter will, under art. 2743 of the Civil Code, be entitled to a privilege for the payment of their labor on the building constructed by them, entitling them to be paid in preference to the mortgage creditor. It is only where there is an undertaker interposed between the owner and his workmen, that arts. 2744 and 2745 of the Civil Code are applicable. Where workmen are employed by the proprietor himself, they are put on the same footing, and allowed the same privilege as an undertaker. *Succession of Erard*, 333.
9. Where the return on a *fi. fa.* states, that it was levied on the proceeds of the sale of certain slaves seized and advertised to be sold at a future day, at the suit of another party, the plaintiff in the execution will acquire no privilege entitling him to be paid by preference, out of the proceeds. *Per Curiam.* The slaves themselves were not seized, and the proceeds of the sale were not in existence at the time, and could not, therefore, be taken possession of. To entitle a seizing creditor to the privilege conferred by arts.

732, 723 of the Code of Practice, the thing seized must be taken possession of by the officer; otherwise, there is no seizure.

Goubeau v. New Orleans and Nashville Rail Road Company, 345.

10. An overseer, whose services have continued during one year, and a part of a second, has, under art. 3184 of the Civil Code, § 1, a privilege on the crop of the second year, valid against a third person, who purchases during the second year the plantation and crop then in the ground. The privilege, which had been acquired before the sale, could not be divested by it. Such a privilege is not required to be recorded, in order to preserve it. C. C. 3226, 3243. Welsh v. Shields, 484.

See CONTRACTS, 12.

PUBLIC LANDS OF THE UNITED STATES.

1. A patent from the United States for a part of their public lands is conclusive, unless attacked for error or fraud. Carter v. Monetti, 82.
2. The survey of a claim to a portion of the public lands, and its approval by the Surveyor General, are not conclusive upon the government of the United States. Until a patent is issued the title is still in the government, unless it be where the claim has precise and specific boundaries, and has been confirmed by an act of Congress, which, in such a case, is equivalent to a patent. Metoyer v. Larenandière, 139.
4. The settlers on the section of country known as the Neutral Territory, between the Arroyo Hondo and the Sabine, within the limits of the present state of Louisiana, acquired no title to the lands occupied by them, under any custom or usage of the Spanish government, independent of the act of Congress by which their titles were confirmed. Brooks v. Norris, 175.
5. A receipt from the Receiver of Public Moneys for the price of lands purchased from the United States, is sufficient evidence of title to enable the purchaser to maintain an action. Beaumont v. Covington, 189.
6. The decisions of the Register of the Land Office and Receiver of Public Moneys in Louisiana, in relation to confirmed land claims which may conflict or interfere with each other, under the powers conferred by the sixth section of the act of Congress of 3d March, 1831, are not binding on the parties. The act does not take from the courts the right of investigating and deciding on such claims, after those officers have acted thereon.
Terrell v. Chambers, 243.
7. No title to any portion of the public lands of the United States can be acquired by prescription. Kittridge v. Dugas, 482.

PUBLIC THINGS.

The streets of a city, and the banks of a river on which it is built, are *loci publici*, and the municipal authorities are bound to see that the use of them by the public, is not obstructed. They cannot allow any erection thereon

which may render their use inconvenient; and, though they may tolerate, temporarily, works not deemed injurious to the rights of the public, no permission of a Council can prevent a subsequent Council from putting an end to such toleration. As where works have been permitted to be erected across the street and the bank, for the purpose of conveying timber to saw-mills built on lots fronting on the river, the municipal authorities may order such works to be removed, no one having a right to a permanent occupancy of the banks of a river.

Shepherd v. Third Municipality of New Orleans, 349.

QUASI-CONTRACTS.

1. Charges for drayage of cotton, hauled to a cotton press by an agreement with, and on the sole credit of certain persons, who were in possession of the press under a contract by which the owner stipulated to convey the property to them on certain conditions, cannot be recovered by the drayman against the owner, on his selling the press to other persons. There was no privity of contract between the plaintiff and him, and no proof that he ever assumed to pay the charges. *McCauley v. Hagan*, 359.
2. Decision in *M'Williams v. Hagan*, 4 Rob. 374, affirmed. *Ib.*
3. One who has contracted for a building has no right, by cancelling his contract with the undertakers, to disappoint the expectations of persons, who, on the faith of the contract, have entered into engagements to furnish the latter with materials, or to bestow their labor on the work.
Girarthy v. Campbell, 378.
4. A crop, made after the dissolution of the community, by the husband, on land belonging to him, partly with his own slaves, and partly with those of the community, cannot be considered as belonging to the community, nor be included in its settlement before the Probate Court. The husband is bound to account to the heir for the value or proceeds of the labor of the slaves, having acted as his *negotiorum gestor* in the administration of his property; but this has nothing to do with the settlement of the community. The action of the heir, must be brought before the ordinary tribunals.

Babin v. Nolan, 508.

QUASI-OFFENCES.

See OFFENCES AND QUASI-OFFENCES.

RATIFICATION.

The ratification of an act cures all its defects; and a voluntary execution thereof, amounts to a ratification. C. C. 2252.

Citizens Bank of Louisiana v. Tucker, 443.

See MINOR, 4.

directed by art. 3333, before the expiration of that period; and that this inscription may be considered as a renewal of the mortgage between the parties, and against third persons. *Minor v. Alexander*, 166.

4. Under the 5th section of the act of 20th of March, 1827, creating the office of Register of Conveyances for New Orleans, a sale of real estate can have no effect against third persons, but from the date of its registry; and where a judgment against a vendor was recorded by the Register of Mortgages, before the registry in the conveyance office of the sale from him, the sale will be without effect as to the judgment creditor; and this, though a sale of the same property, from the first vendee to the plaintiff, was registered before the judgment was recorded. *Mary v. Lampré*, 314.
5. Neither the parties, nor their heirs, nor the witnesses to the act by which a mortgage is stipulated, can take advantage of its non-inscription during the first ten years from its date (C. C. 3316;) but it will cease to have effect, even as to them, after that period, if not inscribed before its expiration. C. C. 3333. *Lejeune v. Hébert*, 419.
6. The privilege of an overseer is not required to be recorded in order to preserve it. C. C. 3184, § 1. 3226, 3243. *Welsh v. Shields*, 494.

RECOGNIZANCE TO APPEAR AT COURT.

1. The surety in a recognizance for the appearance of a party at a particular term of court, will be liable on his bond, though no proceedings were had against the principal at the term at which he was recognized to appear, where an order was made at that term continuing all cases not disposed of, and, at the succeeding term the principal failed to answer, and the surety failed to produce his body, when called upon to do so.

State v. Plazencia, 417.

2. One who has bound himself in a recognizance to appear at a particular term of the court, will not be absolved by the omission of the Attorney for the State to proceed against him at that term. His appearance at that term, was the only means of protecting him from a forfeiture of his recognizance. *Per Curiam*. The law makes it the duty of the prosecuting attorney to have the parties bound by any recognizance called, and to take judgment against them, if the principal be not produced; but this direction to the attorney, does not release the parties to the recognizance.

State v. Plazencia, 441.

RULE TO SHOW CAUSE.

The right to proceed by a rule to show cause, or on motion, implies the pendency of a suit between the parties, and is confined to incidental matters, arising in the progress of the contestation, except where a summary proceeding is expressly allowed by law. *Thomas v. Bourgeat*, 435.

SACRED THINGS.

The provisions of the ancient laws in force in this State concerning the distinction of things into holy, sacred and religious, and the nature and inalienability of those things, having been abolished by art. 447 of the Civil Code, those mentioned in the 5th Partida, law 15, title 5, as religious, sacred, or holy, may now be alienated as any other property.

Ternant v. Boudreau, 488.

SALE.

- I. *Requisites and Proof of the Contract of Sale.*
- II. *Counter-letters, and Parol Evidence as affecting sales by Authentic Act.*
- III. *Obligations of Vendor.*
- IV. *Vendor's Privilege.*
- V. *Obligations of Vendee.*
- VI. *Rescission.*
- VII. *Judicial Sales.*

I. *Requisites and Proof of the Contract of Sale.*

1. Where an act by which a mortgage is retained is passed in the office of a Parish Judge, acting *ex officio* as a notary public, in relation to property within his parish, no further registry is necessary to give such mortgage effect against third persons. So, of the *procès-verbal* of sale made by a Parish Judge while acting *ex officio* as an auctioneer. A Parish Judge, who acts as a notary, and as Judge of Probates, is not expected to keep a separate office in each capacity. *Dodd v. Crain*, 58.
2. The sale of a slave must be in writing, but the law requires no particular form. The statement in a promissory note, made by the purchaser, that it was given for the price of the slave, is sufficient. *Rachal v. Normand*, 88.
3. Under the 5th section of the act of 20th of March, 1827, creating the office of Register of Conveyances for New Orleans, a sale of real estate can have no effect against third persons, but from the date of its registry; and where a judgment against a vendor was recorded by the Register of Mortgages, before the registry in the conveyance office of the sale from him, the sale will be without effect as to the judgment creditor; and this, though a sale of the same property, from the first vendee to the plaintiff, was registered before the judgment was recorded. *Mary v. Lampré*, 314.
4. An agent authorized to sell, cannot sell to himself. *Allard v. Allard*, 320.
5. A verbal sale of a slave is good against the vendor, only when acknowledged by him, under oath, in answer to interrogatories, and where there was actual delivery of the slave. *C. C. 2255*. Where the answer denies

the sale, it cannot be contradicted by the evidence of witnesses. *Ib.* 2415. Were it permitted, the prohibition of the law as to testimonial proof of verbal sales of real estate, or slaves, would be evaded, by alleging fraud, and propounding interrogatories, and, when answered in the negative, by offering testimony under the pretence of contradicting the answers.

Haydel v. Betts, 428.

6. Where no price has been fixed upon, there can be neither a sale, nor a promise to sell. *C. C.* 1757, 2414, 2437, 2439. *Gorham v. Hayden*, 450.
7. The provisions of the ancient laws in force in this State concerning the distinction of things into holy, sacred and religious, and the nature and inalienability of those things, having been abolished by art. 447 of the Civil Code, those mentioned in the 5th Partida, law 15, title 5, as religious, sacred, or holy, may now be alienated as any other property.

Ternant v. Boudreau, 488.

8. Ornaments of gold and precious stones deposited in a tomb with the body of the deceased, are corporeal things, (*C. C.* 451,) susceptible of ownership, (*C. C.* 480,) subject to be taken possession of by the rightful owner, the heir of the deceased, and to be alienated by him. *Ib.*
9. A sale by the heir of all the moveable and immoveable property of a succession, and of all the rights which he has or may have thereto, places the vendee in the situation in which the heir stood at the death of his ancestor, and entitles such vendee to claim articles of gold and precious stones deposited in the tomb of the ancestor. It is the sale of a succession, which includes all the rights and obligations of the deceased as they existed at the time of the death, or which have since accrued, or may subsequently arise, without exception. *C. C.* 869, 870. Such articles are an integral part of the inheritance, and the heir cannot claim them against the vendee of the succession, on the ground that the latter had no intention, at the time of the sale, of purchasing, nor the former of selling them. *Ib.*

II. *Counter-letters, and Parol Evidence as affecting Sales by Authentic Act.*

10. Defendant claimed to be the owner of a slave under a notarial act of sale, executed to him on the 26th of March. Plaintiff, cited in warranty, as the representative of the alleged vendor, offered in evidence a letter from the defendant to the latter, dated in that month, the day not mentioned, in which, after stating that he has not title to a sufficient number of negroes to obtain a loan which he desired, he requests the alleged vendor "to send him an act of sale for the slave" sued for "for the present." *Held*, that this was a counter-letter, showing that there was no sale as between the parties.

Cox v. Camp, 425.

11. The stipulations in a contract of sale, by authentic act, cannot, between the parties or their representatives, be destroyed or weakened by parol evidence. Nothing but a counter-letter can have that effect.

Citizens Bank of Louisiana v. Tucker, 443.

III. *Obligations of Vendor.*

12. A purchaser, with knowledge of an existing privilege or mortgage, cannot avail himself of its not having been registered.

Rachal v. Norman, 88.

13. A vendor will not be responsible, where the purchaser has voluntarily surrendered the possession of the thing sold, without any action having been brought against him. *Minor v. Alexander*, 166.

14. Defendants contracted to purchase a piece of land for a certain sum, payable part in cash, and the remainder at future periods, but refused to execute the contract on the ground that the property was encumbered with mortgages. Plaintiffs produced an act which had been prepared for the conveyance of the land to the defendants, containing a clause for the intervention of the mortgagees, and the release of their claims, on the payment of the cash price, and the delivery of the notes, for the future instalments according to the terms of the contract. The act was not signed by the mortgagees, but it was proved that they were ready to sign it, on the payment of the cash price and the delivery of the notes. In an action for a specific performance: *Held*, that the existence of the mortgages authorized the defendants to retain the price until the mortgages were released or security given, but did not absolve them from the obligation of completing the purchase; and that plaintiffs offered what was equal to a release of the mortgages, and better than any security which the court could order to be given—the intervention of the mortgagees in the act of sale, for the purpose of releasing their claims, on the compliance of the purchasers with the terms of the sale. Judgment for the plaintiffs. *Grimshaw v. Hart*, 265.

15. Where property is sold without any declaration of the mortgages existing on it, and it is not shown that the purchaser was aware of their existence, the vendor will be bound to exhibit a valid and unincumbered title, previous to calling on the vendee to perform his contract.

Nash v. Parker, 324.

16. A purchaser, disquieted in his possession by a third person's setting up title to the land, of whose claims he was uninformed before the sale, may withhold the price, until quieted in his possession, unless the vendor prefer to give security. *C. C.* 2535. *Lacour v. Landry*, 487.

IV. *Vendor's Privilege.*

17. The privilege on the price of the property sold, where the price has not been paid by the purchaser, nor passed into an account current between him and the insolvent, granted to the consignor by art. 3215 of the Civil Code, in the event of the insolvency of the consignee, will not be affected by the fact that the property was sold with other property of the same kind, and one note taken for the price of both, where the bill of sale shows the price of each parcel, and the amount collected by the syndic can be apportioned accordingly. *Caseaux v. His Creditors*, 268.

18. The privilege of a vendor on the unpaid price of property sold by an agent who has made a *cessio bonorum*, is superior to that acquired by levying a *fi. fa.* on notes given for the price, in the hands of an attorney of the insolvent before his cession. C. C. 3215. C. P. 722. *Ib.*

V. Obligations of Vendee.

19. The maker of a note given for the price of a tract of land, is bound, under art. 2531, of the Civil Code, to pay legal interest on the amount from the time when it became due, till payment. *Minor v. Alexander*, 166.
20. On the sale of land, it was stipulated that the price should be paid in instalments at future periods, but the act was silent as to interest. In an action for the price, with interest from the day of sale : *Held*, that the property producing fruits, the vendor is entitled to interest, but only from the maturity of the instalments. C. C. 2531. *Daigle v. Bruzzé*, 418.
21. Where for the convenience of the vendors, in order to enable them to divide the price among themselves, the notes originally given by the vendees, are cancelled, and others executed in their place, each for smaller sums, but in the aggregate for the same amount, in the same form, and payable at the same periods, nothing being changed as to the position or obligations of the purchasers, there is no novation.

Citizens Bank of Louisiana v. Tucker, 443.

VI. Rescission.

22. An action against a party in possession of slaves, in which the plaintiff prays for a judgment declaring the title under which the former holds to be fraudulent, and ordering the slaves to be sold for the purpose of paying a balance due to him as vendor, with damages for the expense to which he has been subjected, and recognizing his privilege as a vendor, must be brought before the court of the defendant's domicile, and not of the parish where the slaves may be. C. P. 89, 129, 162.

Boner v. Elgee, 6.

23. It is essential to a revocatory action in which an act of an insolvent is attacked, as having been made in fraud and to the injury of his creditors, that fraud should be alleged against the debtor, who must be a party to the suit. *Lawrence v. Bowman*, 21.
24. Where defendants, with a full knowledge of all the circumstances, agree to take back lands, which originally belonged to them from plaintiff, who asserted title thereto, and to pay a certain sum as the price of such rights as the latter may have acquired, he will, on the failure of the defendants to pay the amount agreed upon, be entitled to rescind the contract, and to be reinstated in the position he previously occupied. The principle that a purchaser who acquires what he discovers to be his own is not bound to return it, nor to pay for it, though correct in the abstract, is inapplicable to such a case. *Copley v. Flint*, 54.

25. An action of rescission may be sustained by a vendor against the property in the hands of a third person, though the former have acknowledged in the act of sale that the price had been paid, where such third person had identified himself with the first purchaser, and was aware that the price had not been paid by him. *Ib.*
26. The action allowed by the tenth and eleventh sections of the act of 28th March, 1840, abolishing imprisonment for debt, cannot be maintained, unless the unjust advantage, or preference given by the creditor to one of his debtors, or the conveyance, transfer, mortgage, or pledge of his property made by him, shall have had the effect of injuring the complainant. Thus, where the property alleged to have been fraudulently and illegally sold, had been seized under a *fi. fa.* by a third person, who had, under art. 722 of the Code of Practice, by the mere act of seizure, acquired a preference over the other creditors, the plaintiff cannot maintain his action; as the annulling of the sale could only benefit the creditor who had acquired a privilege by his seizure. *Lott v. Gray*, 152.
27. The purchase by one who had acted as the attorney at law of defendant, of a good and valid title to the land in controversy, from persons not parties to the litigation concerning it, is not such a purchase of a litigious right, as is declared to be null by art. 2422 of the Civil Code.

Evans v. Wilkins, 172.
28. The law raises no presumption of fraud from the fact that the vendor and vendee were brothers-in-law. *Allard v. Allard*, 320.
29. In an action to rescind a sale made by an agent, whose power to sell is conceded, the manner in which he disposed of the proceeds, whether in payment of debt due to himself, or not, is a question not before the court.

Ib.
30. A purchaser who receives the rents of the property purchased, and subsequently declines to complete the contract on the ground that the vendor could not make an unincumbered title, is bound to refund the rents so received. *Nash v. Parker*, 324.
31. To entitle a purchaser to rescind a contract of sale, or to recover damages against his vendor, for failing to comply with its terms, the latter must be put in default, in the manner directed by law. C. C. 1906, 1907, 1908, 1925, 1927. A party is put in default by the terms of his contract, only when it specially provides that he should be deemed to be in default, by the mere act of his failure. C. C. 1905. *Gorham v. Hayden*, 450.
32. A vendee, in possession under a defective title, may suspend the payment of the price until secured against the danger of eviction; but he has no right to a rescission of the sale. C. C. 2535. But this article applies only to a vendee who has accepted the sale, and is in possession; not to one who discovers before accepting a deed or possession, that the vendor sold him what belonged to another. *Rousseau v. Tête*, 471.
33. The formalities prescribed for the sale of the property of minors, being exclusively for their benefit, the nullities resulting from their omission are

- purely relative, and the minors alone, after coming of age, can avail themselves of them. Such a sale is, consequently, not absolutely null. *Ib.*
34. A purchaser of a tract of land and slaves, who has been evicted as to one-third of the property, has a right to have the sale cancelled *in toto*, and to be relieved from the payment of the price. *C. C.* 2487.
- McCollom v. McCollom*, 506.

VII. Judicial Sales.

35. A sale under execution must be made either on the premises, or at the seat of justice of the parish, unless with the consent of the debtor, or it will be annulled. *C. P.* 664, 665. *Lawrence v. Bowman*, 21.
36. The *procès verbal* of the adjudication of property sold by a Court of Probates is evidence of the sale, and no act under the signatures of the parties, is necessary to perfect it. *Faulk v. Pinnell*, 26.
37. The *procès verbal* of a sale, made by a Parish Judge, by which a mortgage is retained and duly recorded, is full evidence of the mortgage, except for the issuing of executory process. For this purpose, and to give to the evidence that authenticity required by law, it must be shown, that the *procès verbal* was signed by the Judge in the presence of two witnesses, and that the note, identified with the mortgage by the *paraph* of the notary, was signed by the party. *C. P.* 733. *Ib.*
38. Where on an application for a monition under the act of 10th March, 1834, by a purchaser at a Sheriff's sale, for the purpose of confirming his title to the property purchased, it is alleged by the party opposing the homologation of the sale, that the previous advertisements required by law were not made, the *onus probandi* is on the petitioner. They are essential to the validity of the sale, and must be proved when denied. *Ex parte Murray*, 74.
39. The legal effect of an adjudication under a *feri facias*, is to transfer to the purchaser all the rights and claims of the party in whose hands the property was seized, (*C. C.* 2598. *C. P.* 690); and the Sheriff is bound, thereupon, to pass an act of sale to the purchaser, and to put him in possession of the property sold. *C. P.* 691. *Winn v. Elgee*, 100.
40. After an adjudication under a *fi. fa.*, which divests the defendant in execution of his title to the property, he can no longer be considered as possessing as owner, which is essential to maintain a possessory action. *C. P.* 47. He must, if he still claims the property, resort to a direct action to annul the Sheriff's sale. *Ib.*
41. Purchasers at Sheriffs' sales cannot be affected by irregularities occurring after the sale—no act of the Sheriff, subsequent to the sale, can affect his rights. The adjudication made by him has, of itself, the effect of transferring to the purchaser all the rights and claims of the party in whose hands the property was seized. *C. P.* 690. It is the last proceeding which concerns the purchaser; it fixes his condition, and is the basis of his title.
- Succession of Goodrich, 107.
42. The return of the Sheriff on a *feri facias* is not conclusive as to the facts

- stated by him, and the purchaser cannot be prejudiced by it. Parol evidence is admissible to explain any ambiguity in it, and to show, beyond the contents of the return, that the formalities required by law for the validity of Sheriff's sales had been complied with, and how they were fulfilled. *Ib.*
43. One claiming under a Sheriff's sale who produces the judgment, execution, and Sheriff's return, showing the adjudication to him, has nothing else to show in support of his title. It is for the opposite party to establish any irregularity or informality in the sale. *Ib.*
44. Executory process by seizure and sale, is a summary and severe remedy and the formalities prescribed by law must be strictly complied with, or the property will not be transferred, and the purchaser acquire no title.
Lowry v. Erwin, 192.
45. To support a sale by a Sheriff or Marshal, under an execution or order of seizure and sale, there must be a valid judgment, by a court of competent jurisdiction; otherwise the title will not be divested. Where there is a total want of jurisdiction, the proceedings are null and void; and the competency of the tribunal may be inquired into. *Ib.*
46. Mortgage creditors of a succession are entitled to notice of any application made by the executor to sell the property on which their mortgages exist.
French v. Prieur, 299.
47. A sale of the property of a succession, legally and regularly made under a judgment of a Court of Probates, discharges the mortgages on it given by the deceased. The purchaser takes the property free of the incumbrances; and the Probate Court may order their erasure. *Ib.*
48. Plaintiff having recovered a judgment against defendants, caused a *fi. fa.* to be levied on a certain portion of a rail road belonging to them, and on certain fixtures, machinery, lumber, and other personal property connected with the road. The whole was offered for sale *in globo*, the Sheriff producing at the sale a certificate from the Recorder of Mortgages showing the existence of a mortgage, having a preference over the plaintiff, in favor of third persons, "on all the rights, privileges, immunities, and titles of the Company." Plaintiff was the highest bidder, but offered a sum less than the amount of the mortgage. The officer returned that there had been no sale. On a rule on the latter, the defendants, and the mortgagees, to show cause why the property offered for sale should not be delivered to plaintiff: *Held*, that there was no adjudication, and that the rule should be discharged.
Ranney v. Orleans Navigation Company, 380.
49. Bricks, made by the former owner, not to be used on the place, but for sale, and lying there at the time of a Sheriff's sale of the premises, are moveables, and not included in the adjudication of the land to the purchaser. *C. C. 459, 460, 464, 465, 468. Key v. Woolfolk, 424.*
50. The purchaser of a slave, sold under a *fi. fa.* against a party in possession, not shown to have been aware of the defects in the title of the latter, being

a possessor in good faith, will be responsible to the owner for the value of his services, only from judicial demand. C. C. 495, 3416.

Haydel v. Betts, 438.

51. Though but one instalment of a debt secured by a mortgage by authentic act, be due, an order of seizure and sale may be obtained for the whole amount of the debt, but the sale must be on terms of credit corresponding with the periods at which the remaining instalments fall due.

Robinson v. Aubert, 461.

52. An adjudication of succession property made and recorded by a Clerk of a Court of Probates legally appointed, is, of itself, a complete title. C. C. 2601. Rousseau v. Tête, 471.

53. The acquired rights of a party to the proceeds of a sale made under an execution in his favor, cannot be affected by subsequent acts, or proceedings, to which he was not a party. Dugas v. Her Husband, 527.

See EXECUTION, 3, 8, 16.

SHERIFF.

1. The possession of a debtor against whom a judgment has been rendered, is divested by the legal seizure under a *feri facias*, and is vested in the Sheriff until the property is disposed of. He is regarded as the rightful possessor, and can maintain an action of trespass against any person disturbing him in such possession. It is his duty to take the property into actual possession. If it be a plantation, it remains sequestered in his custody until the sale, and he may appoint a keeper or manager; and if resisted in the execution of his orders, may employ force, and summon the *posse comitatus*. C. P. 656 to 662, and 762. Winn v. Elgee, 100.
2. An officer who executes process issued by a court without jurisdiction is a trespasser, and liable in damages to the party injured.

Lowry v. Erwin, 192.

SHIPPING.

1. A master of a steamer has no authority to bind the owners farther than for the necessary expenses of the boat. Lambeth v. Vawter, 127.
2. The proprietors of steam tow-boats, such as ply between New Orleans and the Gulf of Mexico, are common carriers, and responsible as such. But it does not follow, because the proprietors are responsible to others for the negligence or misconduct of all their agents and servants, that these are responsible to the proprietors for each other. Thus, the captain cannot be held responsible to the owners, for damages to which the latter were subjected in consequence of an injury to another vessel, resulting from mismanagement of the steamer during the pilot's watch, and when the captain was asleep. *Per Curiam*. It is physically impossible that the master

of a vessel can always be on deck, and he cannot be held liable for every act or omission of the other officers. *Davis v. Houren*, 255.

3. The proprietors of steamers, such as are employed in towing vessels between New Orleans and the Gulf of Mexico, are commercial partners. *C. C. 2796. Per Curiam*. It does not follow because these boats have no privilege for their hire, that their owners are not responsible in the same manner as the owners of boats differently employed. Privileges are arbitrary provisions of the law. *Ib.*
4. The master of a vessel is answerable for the baggage and effects of a passenger delivered to him, and not restored, nor accounted for.
Cosnier v. Golding, 297.
5. Action by the plaintiff for two months wages as the pilot of a river steamer. It was proved that he had been employed for the season, at certain wages, payable monthly; that having determined to leave the boat, he applied to the clerk, in the middle of a voyage, for the payment of two months wages then due, who refused to pay him then; that he never applied to the captain for payment, never informed him of the refusal of the clerk, nor gave him any notice of his intention to leave. It was shown that the captain remonstrated with him for leaving, and that his departure injured the voyage; also that the steamer had made one or more voyages during the first month, and had earned freight, by which the defendants were benefitted. *Held*, that neither the expiration of the month, nor the failure to pay his wages, for which the law gave him a privilege on the vessel, justified the plaintiff in leaving the steamer during the voyage; that by doing so, he forfeited the wages of the last month; but that one or more voyages having been made during the first month, by which freight was earned, plaintiff should have been paid the wages of the first month, and that they were not forfeited by his subsequent desertion. *Baldwin v. Bennett—Rehearing*, 311.
6. The well settled principles of maritime law, that where an officer or seaman employed for a voyage, at monthly wages, voluntarily leaves the vessel, before its termination, without good cause, or the assent of the master, he will forfeit his wages—that if the vessel be lost and earns no freight, the mariner gets no pay, though engaged by the month—and that even where no definite voyage is specified or *terminus* fixed, the contract is subject to the equitable restriction that it shall not be terminated at a time, or under circumstances particularly inconvenient to the other party, should be extended as far as applicable, to persons engaged in the navigation of our rivers and along our coasts. *Ib.*
7. The master of a merchant vessel or steamer, is an officer, within the meaning of art. 3499 of the Civil Code, and the action for his wages is prescribed by one year. *Millaudon v. Martin*, 534.
8. The steam tow-boats, plying on the Mississippi, between New Orleans and the Gulf of Mexico, are vessels performing voyages, like other vessels or steamers. *Ib.*

SLANDER.

See OFFENCES AND QUASI-OFFENCES.

STARE DECISIS.

The rule *stare decisis* is entitled to great weight and respect, where there has been on any point of law a series of adjudications, all to the same effect ; but a single decision, believed to have been unadvisedly or erroneously made, will be overruled. *Griffin v. His Creditors*, 225.—Rehearing.

STATUTES, CITED, EXPOUNDED, &c.

- I. *Statutes of the United States.*
- II. *Statutes of the State.*
- III. *Statutes of Pennsylvania.*
- IV. *Statutes of Mississippi.*

I. *Statutes of the United States.*

- 1789, September 24, § 11. Judiciary act—jurisdiction of Circuit Court. *Lowry v. Erwin*, 192.
- 1790, May 26. Authentication of judicial proceedings. *Jones v. Hunter*, 235.
- , July 20, § 3. Seamen in merchant service. *Millaudon v. Martin*, 534.
- 1811, March 3. Land claims and public lands in territories of Orleans and Louisiana. *Evans v. Wilkinson*, 172. *Kittridge v. Landry*, 477. *Kittridge v. Dugas*, 482.
- 1819, March 3. Piracy. *Millaudon v. Martin*, 534.
- 1820, May 11. Land claims in Louisiana. *Kittridge v. Landry*, 477. *Kittridge v. Dugas*, 482.
- 15. Piracy. *Millaudon v. Martin*, 534.
- 1823, February 28, § 1. Reviving act of 11th May, 1820, relative to land claims in Louisiana. *Kittridge v. Landry*, 477. *Kittridge v. Dugas*, 482.
- 1824, May 26. Titles to lands between Rio Hondo and Sabine. *Brooks v. Norris*, 175.
- Practice in courts of United States in Louisiana. *Lowry v. Erwin*, 192.
- 1828, May 24. Claims to lands between Rio Hondo and Sabine. *Brooks v. Norris*, 175.
- 1831, March 3, § 6. Powers of Register and Receiver to decide on land claims in Louisiana. *Terrell v. Chambers*, 243.
- 1832, June 15. Authorizing inhabitants of Louisiana to enter back-lands. *Beaumont v. Covington*, 189.

1835, March 3, § 3. Offences by masters and officers of vessels. *Millaudon v. Martin*, 534.

1841, August 19. Bankruptcy. *Lewis v. Fisk*, 159.

II. *Statutes of the State.*

1813, March 28, § 18. Clerk's fees. *State v. Phelps*, 308.

1816, ——— 7. Acquisition of a residence in the State. *Lowry v. Erwin*, 192.

1818, ——— 16. ————— *Ib.*

1819, ——— 3. Lease. *M'Lean v. Carroll*, 43.

1821, February 14. Bills of exchange and promissory notes. *Minor v. Alexander*, 166. *Marsoulet v. Jacobs*, 276.

1827, March 13. Bills and notes. *Mechanics and Traders Bank of New Orleans v. Jemison*, 90. *Marsoulet v. Jacobs*, 276. *Gordon v. Dreux*, 299. *Beanel v. Tournillon*, 500.

————— 20, § 5. Registry of conveyances. *Mary v. Lampré*, 314.

1828, ——— 2. Tax on money or property inherited by or bequeathed to absentees. *Succession of Oyon*, 504.

————— 25, § 19. Appeals. *State v. Grant*, 295.

1829, January 23. Minors. *Wilson v. Craighead*, 429.

1831, March 25, § 3. Injunctions. *Gorman v. Hayden*, 450.

1832, April 2, § 1. Divorce. *C. v. E.*, 135.

1834, March 10. Titles of purchasers at judicial sales. *Ex parte Murray*, 74.
—————, § 5. Powers of Mayor and City Council of New Orleans.
Second Municipality of New Orleans v. Orleans Cotton Press Company, 40.

1835, April 2. Charter of Red River Rail Road Company. *Red River Rail Road Company v. Young*, 39.

1837, February 25. Minors. *Wilson v. Craighead*, 429.

———, March 9, § 15. Charter of Mexican Gulf Railway Company. *Mexican Gulf Railway Company v. Viavant*, 305.

1839, ——— 14, § 3. Establishing Commercial Court of New Orleans. *Greiner v. Thielen*, 365.

————— 20, § 23. Dilatory exceptions. *Welsh v. Shields*, 484.

1840, ——— 28, § 10, 11. Acts of debtor in fraud of creditors. *Lott v. Gray*, 152.

1841, February 10, § 17. Compensation of jurors in New Orleans. *Liles v. New Orleans Canal and Banking Company*, 273. *Baldwin v. Bennet*, 309.

1842, February 5. Reviving charters of banks in New Orleans. *City Bank of New Orleans v. Barbarin*, 289.

———, March 14. Liquidation of banks. *Commissioners of Exchange and Banking Company of New Orleans v. Mudge*, 387.
Ib.—Rehearing, 397.

————— 16. Successions. *Wilson v. Murrell*, 68.

- 1842, March 22. *Fieri facias*. *Buard v. De Russey*, 111.
 ———— 26. Liquidation of banks. Commissioners of Exchange and Banking Company of New Orleans v. Mudge, 397.
 Ib.—Rehearing, 397.
 ———— Tax on money or property inherited by, or bequeathed to absentees. Succession of Oyon, 504.
 1843, ——— 22. Appeal and notice of judgment. *Prudhomme v. Edens*, 64.
 ———, April 5, § 2. Off-sets to debts due to banks in liquidation. Commissioners of Exchange and Banking Company of New Orleans v. Mudge, 387. Ib.—Rehearing, 397.

III. Statutes of Pennsylvania.

- 1836, February 18, § 6. Charter of Bank of the United States. *Erwin v. Lowry*, 28.

IV. Statutes of Mississippi.

- 1821, November 26, § 115. Claims against estates of deceased persons. *Harrison v. Stacy*, 15.
 1837. Introduction of slaves into the State. *Cotton v. Brien*, 115.

STEAMER.

See SHIPPING.

SUBROGATION.

See PARTNERSHIP, 12.

SUCCESSIONS.

- I. *Executors, Administrators and Curators.*
- II. *Inventory of Property.*
- III. *Claims against Successions.*
- IV. *Heirs and Legatees.*
- V. *Sale of Property of Successions.*

I. Executors, Administrators and Curators.

1. Before a creditor of a succession can proceed against the surety of a curator, executor, &c., he must, under the sixth section of the act of 16th March, 1842, chap. 120, have pursued the steps pointed out by arts. 1055, 1056, and 1057, of the Code of Practice, and have exhausted all the means which the law gives him to obtain payment from the principal, officially and personally. *Wilson v. Murrell*, 68.
2. The administrator of an estate is amenable, during his lifetime, to the Probate Court from which he derives his authority; but where he dies without having rendered an account, it can be rendered only in the Probate Court

in which his own estate is being administered. But a claim of the person who afterwards became administrator against his intestate, acquired before he became administrator, must be prosecuted before the court in which the succession of the intestate was opened. *Thomas v. Bourgeat*, 435.

II. *Inventory of Property.*

3. A surviving wife who has omitted to cause an inventory to be made of the effects left by her husband, however inconsiderable, in the manner prescribed for beneficiary heirs, cannot renounce the community. It is not enough that she present a petition to the Probate Court, praying that an inventory may be made; she must see that it is done. *C. C.* 2379, 2380, 2381, 2382. She is bound to point out to the Judge all the effects of the community, the concealment or making away with any part of which, will render her incapable of renouncing. *Ib.* 2387. *Chapman v. Kimball*, 94.

III. *Claims against Successions.*

4. By an act of the Legislature of the State of Mississippi, of the 26th of November, 1821, sect. 115, it is provided, that any claim against the estate of one deceased, not presented to the executor, administrator, or collector within eighteen months after the publication of notice for that purpose by such executor, &c., shall be forever barred, and the estate discharged therefrom. Plaintiff, a resident of that State, being the holder of a claim against the estate of the deceased barred by that act, commenced an action against the administrator of a part of the succession situated in this State. *Held*, that the claim being barred in Mississippi, must be considered so in this State. *Harrison v. Stacy*, 15.
5. A creditor of a succession, holding a claim which had been acknowledged, in writing, by the executor to be just, and had been placed among the admitted claims against the estate, subsequently petitioned the Probate Court to have the same ranked as a privileged debt, but did not make the executor a party to the proceeding. A judgment having been rendered *ex parte*, establishing the privilege, on appeal by the executor: *Held*, that the executor, not being a party, the judgment must be reversed.

Succession of Lilley, 24.

6. Though an executor have acknowledged in writing a claim against the estate to be correct, if before paying it he discovers that it had been discharged by the deceased, it is his duty to protect the succession against a second payment. *Ib.*
7. The holder of a note secured by a mortgage, signed by one since deceased, cannot obtain an order of seizure and sale. He is only entitled to a judgment to be paid *in concurso*, according to his rank relatively to the other creditors, and in the due course of administration. *Erwin v. Lowry*, 28.
8. Where a defendant in an action to recover a sum of money *dies pendente lite*, if the heirs be of age and have accepted the succession unconditionally, they may be made parties, and the suit must be prosecuted to judgment in

the ordinary courts; but where the succession has not been accepted purely and simply, and is in the hands of an administrator, curator, or executor, Courts of Probate have exclusive jurisdiction to decide on all claims for money against it, and to establish the rank of the privileges, and the mode of payment. C. P., 924. *Thomas v. Cortes*, 44.

9. It does not follow from the provisions of arts. 21, 120, and 361 of the Code of Practice, that actions shall not abate by the death of one of the parties, but may be continued between the survivor and the heirs of the deceased, that they must continue to be prosecuted in the courts in which they were instituted. All such actions founded on claims for money, on the death of the defendant, must be cumulated with the mortuary proceedings in the Probate Court, and there prosecuted to judgment, unless admitted by the administrator. The creditors have the right of contesting each other's claims in a *concurso*, before the Probate Court, by which they will be paid a *pro rata* dividend in case of the insolvency of the succession. Though no express provision has been made for the transfer of such actions, the law has, by investing the Court of Probates with jurisdiction, impliedly conferred the means necessary to its exercise. The transfer of the record is necessary to the exercise of jurisdiction by the Probate Court. *Ib.*

10. An order of seizure and sale cannot be obtained either from a state court, or a Court of the United States, against mortgaged property composing part of a succession represented by an executor, administrator, or curator, and in the course of administration in a Court of Probates.

Lowry v. Erwin, 192.

11. A creditor, residing in another state, cannot sue in the Circuit Court of the United States, an executor, curator, or administrator of an estate, in course of administration in a Court of Probates, as an insolvent estate, and obtain judgment, and issue execution thereon in violation of the state laws, and take the property out of the hands of the officer administering it, to the injury of the domestic creditors. But if such executor, administrator, or curator, refuse to admit the justice of a debt claimed by an alien or non-resident, and to class it as an acknowledged debt against the succession to be paid as others, he may be sued in the Circuit Court of the United States, and a judgment liquidating the demand may be obtained; but the judgment must provide that it is to be paid in due course of law, out of the assets in the hands of the executor, &c., to be administered, and no execution can be issued in favor of an alien or non-resident creditor, unless one could be issued, in a similar case, in favor of a domestic creditor. *Ib.*
12. A judgment rendered by a court of the United States, cannot be executed by the seizure and sale of the property of an insolvent succession, under the administration of an executor, curator, or administrator. It can only be satisfied by presenting it to the Court of Probates, under whose direction the succession is being administered, for classification, and payment in due course of administration. Nor can a court of the United States issue an order of seizure and sale, (executory process,)

against property belonging to such a succession. It wants jurisdiction, *ratione materiae*. Such jurisdiction belongs exclusively to the Court of Probates. *Collier v. Stanbrough*, 230.

See 2 *Supra*.

IV. *Heirs and Legatees.*

13. In actions by the heirs, or others entitled to successions administered by curators or testamentary executors, for the possession of such successions, under arts. 1000, 1001, 1002 and 1003 of the Code of Practice, as in every other suit, there must be an issue joined before any final judgment can be rendered; and if the curator or executor does not answer, issue must be made by a judgment by default. C. P. 310, 311, 312. Such actions must be in the ordinary form. The provision of art. 1002, that the judge shall pronounce on the claim in a summary manner, only means, as shown by art. 1034, that he shall decide upon it with the greatest practicable celerity, giving it a preference over ordinary cases. *Caldwell v. Glenn*, 9.
14. The acknowledgment of an illegitimate child in a will, is sufficient to entitle such child, when not a colored one, to be considered a duly acknowledged natural child, and to receive as such. C. C. 221, 226, 227.
Jones v. Hunter, 236.
15. Art. 1589, of the Civil Code, creates no exception to the rule, that the transmission of immoveable property situated in this State, whether by inheritance or testamentary disposition, must be according to our laws. *Ib*.
16. A disposition in favor of a natural child or children, cannot exceed one-fourth of the property of the testator, if he leave a legitimate brother or sister, or one-third, if he leave more remote collateral relations. C. C. 1473. The remainder of his estate must go to his legitimate relations. *Ib*. 1474.
Ib.
17. Where an emancipated minor, joins with his co-heirs in an act of settlement and partition of the succession of his mother, and accepts his portion as ascertained thereby, and there is no evidence that the settlement did not embrace all the property of the succession, he will be concluded by it.
Wilson v. Craighead, 430.
18. Ornaments of gold and precious stones deposited in a tomb with the body of the deceased, are corporeal things, (C. C. 451,) susceptible of ownership, (C. C. 480,) subject to be taken possession of by the rightful owner, the heir of the deceased, and to be alienated by him.
Ternant v. Boudreau, 488.
19. A sale by the heir of all the moveable and immoveable property of a succession, and of all the rights which he has or may have thereto, places the vendee in the situation in which the heir stood at the death of his ancestor, and entitles such vendee to claim articles of gold and precious stones deposited in the tomb of the ancestor. It is the sale of a succession, which includes all the rights and obligations of the deceased as they existed at the

time of the death, or within the year following, or at any subsequent sale, without exception. C. C. 329, 334. The estate of the deceased part of the inheritance, and the sale of the same, shall be subject to the claims or the succession, on the ground that the same shall be intended, at the time of the sale, of purchasing, nor the future of either estate. In

30. The 4th section of the act of 15 March, 1812, imposing a tax of three per cent on all sums, or on the value of all property, received by any non-resident alien, as heir, donee, or legatee, from any succession opened in this State, or on so much thereof as is situated in this State, applies only to successions opened by the death of the decedent, subsequently to the passage of the act. *Succession of Orin, 134.*

V. Sale of Property of Successions.

91. Mortgage creditors of a succession are entitled to notice of any application made by the executor to sell the property on which their mortgages exist. *Finch v. Priory*, 20.
92. A sale of the property of a succession, legally and regularly made under a judgment of a Court of Probate, discharges the mortgagee as it given by the deceased. The mortgagee is the successor of the intestate estate, and the Probate Court may order their payment. *Id.*
93. An affidavit of assets of a deceased person, returned by a Clerk of a Court of Probate legally qualified, is evidence of truth, as against the estate. *Reid v. Reid*, 24.

If the mandate of the Supreme Court is not shared, the party against whom the judgment has been rendered is free to challenge it, and to demand by the means in which the constitution is made, and controlled by a convention.

Learning Objectives

1. A party has the right to rescind his contract if the other party has sought to make some change beneficial to the contract under the penalty of religious belief. *Wheeler v. Woodbridge*, 47.
2. The statute is applied to the State for the good behavior of a party and the execution of every material obligation of all the pleas which their principal could urge. A wife executed entered us in their principal will discharge them. *The State v. Ross*, 48.
3. Before a writ of a mandamus can be issued against the county of a court, the county must have been first notified of the act of its officers. 1049. See 100 laws passed by the Legislature.

and 1057, of the Code of Practice, and have exhausted all the means which the law gives him to obtain payment from the principal, officially and personally. *Wilson v. Murrill*, 68.

See **BILLS OF EXCHANGE, AND PROMISSORY NOTES, 9. RECOGNIZANCE TO APPEAR AT COURT.**

TAX.

1. The 19th section of the act of 25 March, 1828, amending the Civil Code and Code of Practice, which grants an appeal in any case in which it is contended that the right of imposing a tax is contrary to the constitution or to the laws of the State, whatever may be the amount of the tax, refers only to claims for taxes sued for originally before a Justice of the Peace, or an Associate Judge of the City Court of New Orleans; and where the amount claimed is under three hundred dollars, the Parish Court in the Parish of Orleans, and the District Court, in the other Parishes of the State, are the highest courts to which such an appeal can be taken. Though such a claim were sued for originally in the Commercial Court, no appeal can be taken to the Supreme Court. *State v. Grant*, 295.
2. The 4th section of the act of 26 March, 1842, imposing a tax of ten per cent on all sums, or on the value of all property, received by any non-resident alien, as heir, donee, or legatee, from any succession opened in this State, or on so much thereof as is situated in this State, applies only to successions opened, by the death of the ancestor, subsequently to the passage of the act. *Succession of Oyon*, 504.

TESTAMENT.

See **DONATIONS MORTIS CAUSA.**

TREATY.

See **CADDO INDIANS, 3, 4. EVIDENCE, 24.**

TRESPASS.

See **OFFENCES AND QUASI-OFFENCES.**

TRUST.

See **INSOLVENCY, 10, 11, 12.**

INDEX.

651

UNDERTAKER.

See **CONTRACTS**, 13. **PRIVILEGE**, 8. **QUASI-CONTRACTS**, 3.

USURY.

See **INTEREST**, 1, 4.

END OF VOLUME VI.

ERRATA.

Page 100, line 7 from bottom, for 2589 substitute 2598.

143, 2 top, 2296 " 2966.

149, 16 top, 2517 " 3517.

154, 1 at top, 16th " 10th.

192, 2 from bottom, strike out *against*.

256, 1 at top, for 2974 substitute 2796.

263, 12 from bottom, 5659 " 2659.

288, 1 at top, after word *John* insert *L*.

314, 7 from bottom, for 2th substitute 20th.

320, 6 top, *the debt* substitute *a debt*.

332, 17 " *Deloincourt* " *Delvincourt*.

328, 14 " 2339 " 2739.

328, 15 " 2340 " 2740.

339, 14 " *parties* " *party's*.

351, 10 " *parties* " *partners*.

363, 2 " *or* " *of*.

382, 6 " *property, not* " *property*. *Not*.

427, 7 bottom, 393 " 398.

429, 7 " 1839 " 1829.

435, 8 " *mill* " *mir*.

508, 10 " *whom* " *which*.

508, 6 " 453 " 458.

534, 1 at top, 27,44 " 2744.

